(1) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SAC & FOX NATION OF OKLAHOMA, et al.,

Petitioners,

v.

ANDREW CUOMO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under due process standards and the standard requiring a short and plain statement of the grounds upon which the court's jurisdiction depends which must be construed liberally to do substantial justice, the petitioners received a fair hearing on a complaint alleging that federal officials named as defendants were misallocating federally appropriated funds to the detriment of the plaintiff Indian tribes invoking federal question jurisdiction under 28 U.S.C. §§ 1361-1362 but not citing a specific federal law?

2. Whether, under the "appearance of bias" standard of 28 U.S.C. § 455(a) and the due process required by the Fifth Amendment, the Petitioners were denied their right to a fair and impartial magistrate where the presiding judge:

   a. Had, prior to becoming a federal judge, previously appeared as an attorney of record for one or more of the defendants in prior litigation involving the plaintiff and the same or similar issues?

   b. Did not document in the record the actual extent of involvement in the prior litigation when denying a motion to recuse; and

   c. Managed the litigation in a fashion from which one could reasonably infer that the plaintiffs were being effectively denied relief without ever being allowed their day in court.

PARTIES TO THE PROCEEDINGS

The Petitioners (Plaintiffs/Appellants below) are three federally recognized Indian tribes and their tribal housing authorities: the Sac and Fox Nation of Oklahoma, the Housing Authority of the Sac and Fox Nation of Oklahoma, the Citizen Potawatomi Nation, the Citizen Potawatomi Nation Housing Authority, the Kickapoo Tribe of Oklahoma, and the Housing Authority of the Kickapoo Tribe of Oklahoma.

Respondents (Defendants/Appellees below) are primarily federal agencies, officers and employees: Andrew Cuomo, Secretary of the United States Department of Housing and Urban Development (hereafter "HUD"); Dom Nessi, HUD's Deputy Assistant Secretary for Native American Programs; and Wayne Sims, HUD's Administrator of the Southern Plains Office of Native American Programs (hereafter "SPONAP") (hereafter collectively "Federal Defendants").

Respondent (Defendant/Appellee below) Absentee Shawnee Housing Authority (hereafter "ASHA"), is an agency of the State of Oklahoma.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Sac and Fox Nation of Oklahoma, the Housing Authority of the Sac and Fox Nation, the Citizen Potawatomi Nation, the Citizen Potawatomi Nation Housing Authority, the Kickapoo Tribe of Oklahoma, and the Housing Authority of the Kickapoo Tribe of Oklahoma, (hereafter the "Three Tribes"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The Opinion below is reported at 193 F.3d 1162 (10th Cir. 1999). Consistent with SUP. CT. R. 14.1(i), a copy of the Opinion below is included in the Appendix at App. 1.

JURISDICTIONAL STATEMENT

This petition is being filed within ninety (90) days after the entry of an order denying discretionary review. SUP. CT. R. 13.1. The Court of Appeals decision was filed October 12, 1999. Petitioner's timely petition for rehearing was denied December 9, 1999.

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Federal agencies and officers are parties to this action. Service has been made upon the Solicitor General in addition to the parties consistent with SUP. CT. R. 29.4(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person * * * shall be deprived of life, liberty, or property, without due process of law * * * ."

Section 455 of Title 28 of the United States Code provides, in relevant part: "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Section 1331 of Title 28 of the United States Code provides, in relevant part: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Section 1362 of Title 28 of the United States Code provides, in relevant part: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

STATEMENT OF THE CASE

The suit below was brought by federally recognized Indian tribes seeking equitable relief against several federal officials and a state-chartered Indian housing authority. The federal Defendants are Andrew Cuomo as Secretary of the United States Department of Housing and Urban Development (hereafter "HUD"), Dom Nessi as Deputy Assistant Secretary for Native American Programs (hereafter "Nessi"), and Wayne Sims (hereafter "Sims") as Administrator of the Southern Plains Office of Native American Programs (hereafter "SPONAP") (hereafter collectively "Federal Defendants"). Because the

relief could affect the Absentee Shawnee Housing Authority (hereafter "ASHA"), it was also a named defendant.[1] The Three Tribes sought equitable relief from territorial incursions by ASHA funded and promoted by the Federal Defendants in violation of federal law.

Although the district court dismissed the complaint "for lack of federal question jurisdiction"[2] a year after filing, the case was essentially litigated for less than two months because 55 days into the case, the district court *sua sponte* entered an order staying "all further proceedings in" the case. App. 16. This order, subsequent actions and inactions by the trial judge, denied the Three Tribes their due process right to a fair hearing and the right to a hearing before a fair and impartial magistrate contrary to decisions of this Court.

A. Background of Action and Complaint.

Under the Housing Act of 1937[3] and subsequently under the Native American Housing Assistance and Self-

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[1] The ASHA was established pursuant to Oklahoma state law, 63 O.S. 1991, §§ 1051 *et seq.* Though "an agency of the State of Oklahoma" (*id.* § 1057), ASHA is controlled corporately by a sponsoring tribe (the Absentee Shawnee Tribe of Oklahoma) and is controlled operationally by the Federal Defendants who essentially provide all funding.

[2] The district court also alternatively dismissed the complaint because "the Absentee Shawnee Tribe is an indispensable party that cannot be joined on account of sovereign immunity." App. 36. However, the Tenth Circuit vacated this portion of the dismissal order. App. 14.

[3] United States Housing Act of 1937 (Low Rent Housing Act) (Sept. 1, 1937, ch. 896, 50 Stat. 888) as amended (codified at 42 U.S.C. §§ 1437-1437aaa-7).

Determination Act of 1996 ("NAHASDA"),[4] HUD administers federal monies appropriated to provide low income housing to Native Americans living on or near Indian reservations.[5] By statute and regulation, HUD allocates appropriated funding to regional areas where the allocations are subsequently distributed by the area offices to Indian tribes or their housing authorities who administer the federal programs. The Three Tribes and the Absentee Shawnee Tribe of Oklahoma (ASHA's sponsoring tribe) are located within HUD's SPONAP area.

To efficiently allocate these programs and funds and to avoid unnecessary conflicts, the Federal Defendants recognize "service areas."[6] Under HUD regulations, the

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[4] Native American Housing Assistance and Self-Determination Act of 1996 (Pub.L. 104-330, Oct. 26, 1996, 110 Stat. 4016) (codified at 25 U.S.C. §§ 4101-4212, 42 U.S.C. § 12899h-1).

[5] Under federal statutory and regulatory law, the phrase "Indian reservation" includes former reservations in Oklahoma. *See, e.g.*, 12 U.S.C. § 4702(11), 16 U.S.C. § 1722(6)(C), 17 U.S.C. § 1452(d), 25 U.S.C. §§ 2024(b)(3), 3103(12), 3203(9), 3501(2), 29 U.S.C. § 741(c), 33 U.S.C. § 1377(c), 40 U.S.C. § 483(a)(1), 42 U.S.C. § 2992c(2), 5318(n)(2); 24 C.F.R. § 1000.302, 25 C.F.R. §§ 63.3, 101.1, 103.1, 256.2, 286.1, 34 C.F.R. 361.5(40), 369.4, 371.4, 41 C.F.R. § 36.10. Because "reservation" under the HUD regulations means "former reservation" in Oklahoma, the Three Tribes will hereafter refer to their former reservations as "reservations."

[6] *See* 24 C.F.R. § 1000.302(vi). *See also* 25 C.F.R. § 256.2, defining "service area." ("*Service area* means reservations (former reservations in Oklahoma), and allotments, restricted lands, Indian-owned fee lands * * * within a geographical area designated by a tribe, and approved by the Area Director to which equitable services can be delivered."). *See also* 63 O.S. 1991, § 1054(f), defining "area of operation" for an Indian housing authority created under state law. HUD's "service area" and Oklahoma's "area of operation" refer to the same

service area for federal Indian housing programs is the sponsoring tribe's trust lands and reservation lands as extended by near reservation designations. Federal funding is to be allocated to a tribe or to an Indian Housing Authority ("IHA") based on the qualifying Indian population in the tribe's service area. 24 C.F.R. §§ 791.402 and 905.205. To operate outside of its service area, a tribe or an IHA must receive the consent of the tribe in whose service area the project is planned.[7]

The Three Tribes each have reservations. The Absentee Shawnee Tribe does not have and has never had a reservation in Oklahoma,[8] but does have some trust lands. Thus, the ASHA's service area is the trust lands of the Absentee Shawnee. Under federal law, the ASHA cannot operate outside of Absentee Shawnee trust lands

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lands, *i.e.*, a tribe's trust lands and those lands within the tribe's reservation boundaries as extended by near reservation designations. 25 C.F.R. § 20.1, ¶ (r). "*Near reservation* means those areas or communities adjacent or contiguous to reservations which are designated by the Commissioner * * * and publish[ed] * * * in the FEDERAL REGISTER."

[7] 24 C.F.R. § 1000.10 ("Indian area"), § 1000.302 ("Formula area is the geographic area over which an Indian tribe could exercise court jurisdiction or is providing substantial housing services and, where applicable, the Indian tribe or TDHE has agreed to provide housing services pursuant to a Memorandum of Agreement with the governing entity or entities (including Indian tribes) of the area, * * * "). *See also* Op. Okla. Att'y Gen. No. 78-136 (July 31, 1978) (Indian housing authorities (such as ASHA) "can lawfully operate only within their areas of operation * * * One authority must obtain approval from another Indian housing authority when it intends to carry out a project within the area of operation of that Indian housing authority.")

[8] *Citizen Band Potawatomi Indian Tribe v. Collier*, 142 F.3d 1325 (10th Cir. 1998), *cert. denied sub nom Absentee Shawnee Tribe v. Citizen Band of Potawatomi Indian Tribe*, 525 U.S. 947 (1998) (hereafter "*Collier II*").

in another tribe's reservation without first obtaining consent from the reservation tribe.

HUD has allocated and continues to allocate federal funding to the ASHA that has been and is being used to purchase housing on non-trust lands located in the Three Tribes' reservation boundaries over objections by the Three Tribes. The effect of the Federal Defendants' improper allocations[9] is that the ASHA, whose sponsoring tribe has no reservation and only 9 percent of the total enrolled tribal population of the four relevant tribes,[10] has received and will continue to receive disproportionate allocations of HUD funding for Indian housing projects in the Three Tribes' areas to the detriment of the Three Tribes.[11] HUD and SPONAP were continually advised of the ASHA's illegal encroachments on other

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[9] The present SPONAP administrator was the ASHA's Executive Director before joining SPONAP in June of 1995. In late February a year later, SPONAP awarded ASHA $11,690,265 that according to Federal Register reports was the second largest single federal housing grant to any Indian tribe in the United States in the last two years. 61 Fed. Reg. 7799 (Feb. 29, 1996). Sims effectively controlled the ASHA when the grant applications had to be submitted and during the period of time when most of these encroachments on other tribal areas occurred. Also, his wife was Acting Executive Director of the ASHA for a time after he became the SPONAP administrator.

[10] According to the U.S. Department of the Interior Bureau of Indian Affairs, the Tribal Enrollment Population as of 1997 was: Potawatomi 24,414 (77%), Sac & Fox 2,195 (7%), Kickapoo 2,153 (7%), and Absentee Shawnee 2,832 (9%). "BIA Indian Labor Force Report," p. 3 (1997).

[11] According to Federal Register reports of federal Indian housing funding awards, the ASHA received twice as much funding from 1995-1997 as the Three Tribes combined received. Though the ASHA had 9 percent of the population and 1 percent of the land, it received 65 percent of the funding during these three years.

tribes' service areas but refused to halt the encroachments or federal funding allocations that continue to this day.

After complaining to the Federal Defendants for over a year about the illegal allocations of federal funding to and de facto approval of the ASHA constructing federal Indian housing in the Three Tribes' service areas, the Three Tribes brought suit on May 13, 1997, in the United States District Court for the Western District of Oklahoma for injunctive and declarative relief. Simultaneously, the Three Tribes moved for a preliminary injunction to enjoin the Federal Defendants and the ASHA from any further intrusions into the Three Tribes' service areas pending a complete adjudication. A hearing on the motion was set for May 29.

In the complaint (App. 41), the Three Tribes alleged that jurisdiction arose under 28 U.S.C. §§ 1331 and 1362 (App. 64), that "[e]very housing unit operated by the ASHA must be approved and funded by HUD," and that the Federal Defendants "have been continually advised of the ASHA's illegal encroachments on other tribes' areas, but have refused to halt the encroachments, and if not enjoined, will continue to allow these encroachments and allocate federal funding to the ASHA based thereon." App. 45, ¶ 25. The Three Tribes prayed for declarative and injunctive relief against the Federal Defendants.

B. Actions by the district court and the recusal motion.

On Friday, May 23, the Federal Defendants asked that the case be referred to a settlement judge, that they be granted an extension of time to file a response to the Three Tribes' motion for a preliminary injunction, and that the hearing be continued.[12]

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[12] The District Court docket is found in the Appendix at pages 67-79.

On Tuesday, May 27, the day after observance of Memorial Day (May 26) the Three Tribes filed an objection to the Federal Defendants' request for an extension of time and to continue the hearing because of the necessity of maintaining the *status quo*, but did not object to referral of the case to a settlement judge; the ASHA filed its own motion for an extension of time to file a response to the Three Tribes' motion for a preliminary injunction and to continue the hearing; and the District Court granted both the ASHA's and the Federal Defendants' motions for extensions of time. However, instead of continuing the May 29 hearing, the District Court stated that: "The hearing on plaintiffs' motion for a preliminary injunction currently set for May 29, 1997 is hereby stricken to be re-set by the court on a date after June 26, 1997." The District Court also granted the Federal Defendants' request for referral of the case to a settlement judge.

On June 4, the ASHA moved to dismiss the complaint for failure to state a federal question, for failure to join an indispensable party ("Absentee Shawnee Tribe of Oklahoma"), and for lack of standing.

On June 27, the Federal Defendants filed their objection to the Three Tribes' motion for a preliminary injunction. On July 3, the ASHA filed its objection to the preliminary injunction.

On Monday, July 7 (July 4-6 was a holiday period), without rescheduling the previously-stricken hearing, or otherwise giving the Three Tribes an opportunity to present evidence and/or to respond to the arguments and authorities raised by the Federal Defendants and the ASHA in their objections, the District Court denied the Three Tribes' requested motion for preliminary injunction and *sua sponte* entered a second order stating: "Pending resolution of the motion to dismiss filed June 4, 1997, by

defendant Housing Authority of the Absentee Shawnee Tribe of Oklahoma, all further proceedings in this case are stayed." App. 16.

On July 15, the Three Tribes filed a motion to lift the stay order or, alternatively, to lift the stay order for the limited purpose of considering a recusal motion and a motion to alter or amend the order denying preliminary injunctive relief. In their motion, the Three Tribes argued that by entering the stay, the District Court effectively precluded the plaintiffs from meeting the arguments of the defendants, from timely presenting the case, from satisfying the evidentiary burdens required by the District Court, and from timely resolving the case before the next federal funding cycle that would lock in federal monies to the ASHA for another year. The Three Tribes also pointed out that no party had asked for the stay, which served no purpose other than completely stopping the Three Tribes' attempt to litigate their claims. With plenary control of the docket, the District Court gained nothing from the stay order.

On August 20, the District Court lifted the stay solely to consider the motion for disqualification. On August 22, the Three Tribes filed a motion for disqualification pursuant to 28 U.S.C. § 455(a), arguing that a United States Judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" citing the judge's prior involvement as an attorney of record for an adverse party in a case involving similar issues and parties.

On September 15, the ASHA filed a response to the Three Tribes' motion for disqualification. On September 16, the Federal Defendants filed a response.

On September 19, the District Court denied the Three Tribes' motion for disqualification "for the reasons stated

in defendant Absentee Shawnee Housing Authority's September 15, 1997 response brief." App. 20.

On February 24, 1998, attorneys for the Citizen Potawatomi Nation, one of the Three Tribes, sent a letter to the District Court pursuant to LCvR7.1(*l*),[13] giving notice that " 'Defendant Absentee Shawnee Housing Authority's Motion to Dismiss,' filed June 4, 1997, has been submitted for decision for a period of more than ninety (90) days." On the date of this letter, the ASHA's motion to dismiss had been pending for 265 days. When the District Court still did not take any action on the motion, the Three Tribes filed a petition for a writ of mandamus on March 18, asking the Tenth Circuit to direct the District Court to: (1) lift the stay order, (2) recuse the assigned judge, and (3) require the successor judge to rule on the outstanding motion to dismiss by a date certain.

On March 24, two days before a response to the writ was due, the District Court entered an order granting the ASHA's motion to dismiss "for lack of federal question jurisdiction or, in the alternative, for failure to join an indispensable party, the Absentee Shawnee Tribe of Oklahoma." The court explained:

> This case appears[14] to be either a dispute about what is ASHA's proper area of operation, which

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[13] App. 66.

[14] That the court had only a vague understanding of the complaint after the litigation had been pending for nearly a year is inexcusable. If the court had any questions about the allegations, the court could have allowed an amendment, asked for additional briefs, or held oral argument. *See, e.g.*, WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1350. The *sua sponte* stay order precluded any meaningful communication between the court and the parties about the allegations in the complaint.

> is a matter to be determined under the Oklahoma statute under which ASHA was created, or it is a dispute between the plaintiff Tribes and the Absentee Shawnee Tribe about tribal jurisdiction.[15] If it is the former, there is a lack of federal question jurisdiction. If it is the latter, the Absentee Shawnee Tribe is an indispensable party that cannot be joined on account of sovereign immunity.

App. 36.

On April 7, the Tenth Circuit denied the Three Tribes' request to file a reply and denied the writ "as moot."

Because the March 24th order did not dismiss the action, did not specifically dismiss all Defendants, and was in a form contrary to Fed. R. Civ. P. 54(a), the Three Tribes did not believe it was a "final order" under 28 U.S.C. § 1291. Consequently, on April 14, the Three Tribes moved the District Court to enter a final order so that an expeditious appeal could be brought.

On April 27, the Three Tribes contacted opposing counsel about the April 14th motion and sent a letter to the District Court with a proposed final order dismissing the complaint as to all parties. The District Court was advised that the Federal Defendants did not object to the entry of the proposed order, but that Defendant ASHA objected because "any further order is superfluous."

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[15] This is a complete misunderstanding of the allegations in this suit. It was in the *Collier* case, where the Assigned Judge had once appeared as attorney of record, that the Potawatomi dispute with the Absentee Shawnee over territorial jurisdiction was resolved.

On May 6,[16] the District Court *sua sponte* directed all Defendants "to file a response to plaintiffs' [Appellants'] 'Motion for Entry of Final Order and Supporting Brief,' which was filed April 14, 1998, by May 22, 1998." This response date (Friday, May 22, 1998) was one working day before expiration of the time to appeal from the March 24th order if the Three Tribes were wrong about the finality of the March 24th order. In an effort to avoid a potentially fatal appellate error, the Three Tribes immediately filed a May 7th appeal from the March 24th order.

On May 28, the District Court entered an order stating that, "Plaintiffs' 'Motion for Entry of Final Order,' filed April 14, 1998, is DENIED for the reasons stated by defendants in their respective response briefs filed May 22, 1998." App. 38.

REASONS FOR ALLOWING THE WRIT

The Tenth Circuit affirmed two District Court orders. First, the panel affirmed an order granting a motion filed by ASHA to dismiss the complaint for lack of federal question jurisdiction that precluded the Three Tribes from litigating their claim that a federal agency is acting contrary to federal law in improperly allocating federal funds contrary to decisions of this Court. Second, the panel affirmed a district court order denying the Three Tribes' motion that the assigned judge recuse that precludes the Three Tribes from seeking relief from a forum untainted by an appearance of partiality contrary to due process and to decisions of this Court.

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[16] Under the local rules, a party has eighteen (18) days to file a response to a motion. Any motion "not opposed within eighteen (18) days may, in the discretion of the Court, be deemed confessed." LCvR7.1(e). The time limit to respond to the Three Tribes' motion expired on May 4.

ARGUMENT

I

The petition should be granted because the opinion below conflicts with prior decisions by this Court that complaints are to be liberally construed, that litigants are not to be denied their day in court by a premature dismissal, and that federal question jurisdiction does not require citation in the complaint to a specific federal law.

In the complaint, the Three Tribes alleged 28 U.S.C. §§ 1331 and 1362 as the basis for jurisdiction in the District Court. Both statutes require that a plaintiff's cause of action "arise under the Constitution, laws, or treaties of the United States." A case "arises under" federal law when "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983).

In dismissing the complaint, the District Court stated:

> [P]laintiffs do not plead any constitutional provision, federal law or treaty upon which federal question jurisdiction could rest. To the contrary, the only law at issue appears to be the Oklahoma Housing Authorities Act, 63 O.S. § 1051 *et seq.*, since the gist of plaintiffs' complaint is that ASHA is allegedly developing low income homes outside its 'area of operation' as set out in the Oklahoma Housing Authorities Act.

App. 32. As support for this conclusion, the District Court relied on *two* statements in the complaint and arguments by ASHA. The District Court ignored the federal issues and allegations relating to the Federal Defendants in the

complaint that "directly and necessarily relat[e] to the plaintiff[s'] cause of action * * * ," [*Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 481 (10th Cir. 1975)], and ruled before ever hearing from the Federal Defendants on jurisdiction.

The specific statutes and regulations missing from the complaint were in transition (see notes 3-4, *supra*) when the Three Tribes filed their complaint, which they brought in hopes of resolving this dispute before the effective date of the Native American Housing and Self Determination Act (NAHASDA).

Both the District Court and the Tenth Circuit panel focused solely or primarily on the allegations in the complaint relating to ASHA, the moving party.[17] The focus of the Three Tribes' complaint is against the Federal Defendants who control ASHA's funding and enforce federal housing regulations. The relief sought against ASHA was ancillary. 28 U.S.C. § 3523.

In affirming the district court order dismissing the complaint for lack of federal question jurisdiction, the Tenth Circuit found the complaint deficient for failing to specifically identify the federal laws implicated, said this deficiency could be cured on appeal by statements of counsel in the record, implied that a rule cited by the

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[17] The District Court stay order – entered 5 days before the Federal Defendants' (the primary defendants) answer date – relieved the Federal Defendants of their obligation to respond to the complaint and created an ambiguous focus. The mis-focus may also have occurred because the most substantive allegations in the complaint (paragraphs 24-25) were near the end. Any resulting confusion should have been dispelled by the prayer for relief which seeks injunctive relief against the Federal Defendants.

Three Tribes on appeal would have cured the deficiency in the complaint, but chose not to rely on this citation because it was "not argued until on appeal and, even then, only in the most vague and opaque fashion and for the very first time in a footnote in their reply brief." *Sac & Fox Nation of Oklahoma*, 193 F.3d 1162, 1167 (10th Cir. 1999). App. 11.

Each part of the Tenth Circuit rationale is problematic. **First**, the Supreme Court has held that a complaint is not dismissible for lack of federal question jurisdiction solely because of a failure to cite a specific federal law in the complaint. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) ("in order to invoke a federal district court's jurisdiction under § 1331, it was not essential that the petitioners base their claim on a federal statute or a provision of the Constitution."). "Federal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in § 1331." *Id.* Here, on the face of the complaint, construction of federal laws was clearly the focus of the case, *e.g.*, federal housing laws, federal appropriation laws, federal relationships with Indian tribes,[18] administration of federal agencies, federal recognition of Indian reservation boundaries, etc. The relief sought was against a federal agency concerning its allocations of federally-appropriated monies to Indian

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[18] "As we have often noted, Indian tribes occupy a unique status under our law. At one time they exercised virtually unlimited power over their own members as well as those who were permitted to join their communities. Today, however, the power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes." *Id.* at 851 (footnotes omitted).

tribes. "We begin with the strong presumption that Congress intends judicial review of administrative action. From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' *Abbott Lab. v. Gardner*, 387 U.S. 136, 140 (1967) (citing cases). *See generally* L. Jaffe, Judicial Control of Administrative Action 339-353 (1965)." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

Second, the Tenth Circuit's stated basis for refusing to accept an appellate reference to a federal law is simply not accurate. The panel said the Three Tribes did not cite the referenced regulation until the reply brief. As the panel itself noted,[19] the Three Tribes cited the referenced regulation[20] and its antecedent regulations in the first pleading filed on appeal specifically with reference to the allegations in the complaint. The panel's criticism of the "belated" assertion of this federal law is not justified by the record. The Three Tribes were never allowed oral argument on the motion to dismiss. Their hearing on a motion for preliminary injunction was stricken to be reset, but never reset. The Federal Defendants never moved to dismiss and hence the Three Tribes were never required to respond. Only one of the four defendants

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[19] App. 10. "When asked the direct question at oral argument, plaintiffs' counsel asserted that the specific federal regulation allegedly violated is 24 C.F.R. § 1000.302, the regulation which made its *first* belated *appearance* in footnote 31 of plaintiffs' *appellate brief*." (emphasis added)

[20] The proposed regulation was published for public comment on July 2, 1997, five days before the stay order was entered. The regulation did not become effective until April 13, 1998, nine months later. Implementation of the Native American Housing Assistance and Self-Determination Act of 1996; Final Rule, 63 Fed. Reg. 12,334 (1998).

(ASHA, the pendent litigant) moved to dismiss the complaint. More importantly, the district court *sua sponte* entered an order staying all proceedings. Except to rule on the recusal motion, this unrequested stay order was never lifted by the district court. Thus, the panel's comments about the Three Tribes' dilatory behavior[21] are not a fair representation of the record. The stay order (entered 34 days after the motion to dismiss was filed) prevented the Three Tribes from taking any discovery, filing any pleadings, amending the complaint or taking any action.[22] Under these circumstances, the Tenth Circuit's refusal to allow the alleged deficiency to be supplied on appeal acted contrary to decisions by this Court that complaints are to be liberally construed to do justice.

Under rules established by this court, "All pleadings are to be construed so as to do substantial justice." Fed. R. Civ. P. 8(f). This rule seeks to make certain that a

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[21] Because of the stay order, the window of litigation in this case was very small and much of that narrow window was wasted on defendants' frivolous motion for a settlement conference. Though having successfully urged the District Court to refer this case to a federal magistrate for settlement, both the Federal Defendants and the ASHA came to the settlement conference on June 23 arguing that the District Court had no jurisdiction over the case. A settlement judge could hardly broker a settlement among the parties when all the defendants were claiming the District Court had no jurisdiction over the case. Thus, the request for the settlement conference served no purpose other than to ultimately deny the Three Tribes a hearing on their motion for a preliminary injunction and unnecessarily delay the litigation.

[22] After entry of the stay order, the Three Tribes did file three motions in the district court: a motion to lift the stay order which was denied except to rule on a recusal motion, a recusal motion which was denied, and a motion for entry of a final order which was denied 44 days after filing which was two days after the appeal time for the dismissal order expired.

litigant is not prematurely dismissed, *i.e.*, denied the due process right to a fair hearing. Whatever the deficiencies of the complaint, the Three Tribes were precluded from receiving a fair hearing by the *sua sponte* stay order. This order foreclosed any oral argument, any further briefing, any discovery, any amendments to the complaint, or any dialog with the court concerning the allegations in the complaint. Under this Court's prior holdings construing the Federal Rules of Civil Procedure and due process, the dismissal order constituted a denial of due process and a too-narrow construction of the civil rules of pleading. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

In their complaint, the Three Tribes asked the District Court to "[r]ender a temporary and permanent injunction against HUD and the Southern Plains Office of Native American Programs, from allocating funding and allowing the operation of ASHA outside of ASHA's legal area of operation." App. 46. The entire basis of the Three Tribes' cause of action rests on this request for equitable relief against the Federal Defendants for violating their own regulations in allocating federal housing funds to ASHA. Without such funding, ASHA would not be constructing federal housing for Indians on non-trust lands located in the Three Tribes' service areas over the objections of the Three Tribes.

This case involves the relationship among Indian tribes, an Indian housing authority, and a federal agency. Not only is the authority to resolve disputes about these relationships constitutionally assigned to the federal

government,[23] but the improper administration of a federal program and the allocation of federal funding are clearly federal questions.[24] These issues were adequately pled in the complaint. In affirming the district court order dismissing the complaint for "lack of federal question jurisdiction," the Tenth Circuit acted contrary to the decisions of this court and denied the Three Tribes their due process right to a fair hearing on their allegations.

II

The petition should also be granted because the opinion below conflicts with this Court's prior rulings on the essential due process right of a litigant to a fair and impartial magistrate and the requirement that a judge challenged under § 455(a) must make a record.

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

The Three Tribes moved the District Court to recuse the Assigned Judge under an "appearance of bias" standard pursuant to 28 U.S.C. § 455(a). The Three Tribes first

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[23] *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562 (1832).

[24] Under 28 U.S.C. § 1331, federal courts have jurisdiction to review agency action. *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

considered seeking recusal only after the Assigned Judge entered a series of orders on July 7, 1997,[25] that raised serious questions about the District Court's management of the case and about a denial of due process that resulted in a gratuitous delay in adjudicating the Three Tribes' suit. These and subsequent orders gave the Federal Defendants a victory while depriving the Three Tribes of their right to challenge that victory on appeal.

One of the July 7 orders – the *sua sponte* stay order – implied a quick decision on ASHA's motion to dismiss. Thus, the Three Tribes initially intended to file an appeal from a final judgment if the decision on the motion to dismiss were adverse, or to continue litigating the case if the District Court determined it had jurisdiction. When it became clear that the District Court was not going to promptly or perhaps ever decide jurisdiction, the Three Tribes reviewed the Assigned Judge's background and uncovered a factual basis for concluding that the Assigned Judge's impartiality "might reasonably be questioned." 28 U.S.C. § 455(a).

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[25] The District Court entered an order denying the Three Tribes' motion for a preliminary injunction. The adverse order is not what stirred the Three Tribes to consider recusal, but the unusual procedural actions by the district court, to-wit: precipitously denying the motion for preliminary injunction without first deciding the jurisdictional challenge, without allowing the movant to reply, without resetting an evidentiary hearing promised in a previous order, and, most importantly, entering an order staying the litigation that no one requested.

A. Prior participation in related litigation.

> The goal of Section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860 (1988) (citations omitted).

In applying the objective standard established by § 455(a), the "initial inquiry is whether a reasonable, factual basis exists for calling the judge's impartiality into question." *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993). As can reasonably be inferred from the following facts, the Assigned Judge was facially an advocate in prior litigation involving essentially the same parties and issues which created an "appearance of partiality" mandating disclosure and probably recusal:

(1) The judge assigned to this case ("Assigned Judge") became the United States Attorney for the Western District of Oklahoma on September 25, 1993.

(2) The Assigned Judge held this post until sworn in as a federal judge on October 8, 1994. During the Assigned Judge's tenure as United States Attorney for the Western District of Oklahoma, the Assigned Judge appeared as counsel of record for Defendant L.W. Collier as area director of the Bureau of Indian Affairs ("BIA") Anadarko office, in the case of *Citizen Potawatomi Nation v. Collier*, No. CIV-92-2161-R (W.D. Okla. Oct. 30, 1992) (complaint) ("*Collier* case").

(3) In that capacity, the United States Attorney took a position virtually identical to that taken here by her successor, to wit: defending the expansive jurisdictional claims of the Absentee Shawnee.

(4) More particularly, the United States Attorney unsuccessfully defended an appeal[26] of an order dismissing the suit for failure to include the Absentee Shawnee as an indispensable party, *i.e.*, one of the precise questions raised by ASHA in its motion to dismiss.

(5) In opposing ASHA's motion to dismiss, the Three Tribes cited *Collier I* as dispositive of ASHA's argument that the Absentee Shawnee are indispensable parties.

(6) The present case presents questions nearly identical to those raised in the *Collier* case.

In summary the Assigned Judge had a facially adverse "interest,"[27] implicated by the litigants and the issues that required, at a minimum, a record disclosure by the Assigned Judge of the extent of participation in the prior litigation.

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[26] *Citizen Band Potawatomi Indian Tribe v. Collier*, 17 F.3d 1292 (10th Cir. 1994) (hereafter "*Collier I*").

[27] An "interest" that would give a disqualifying appearance of partiality does not have to be pecuniary. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 829-830 (1986) (Brennan, J., concurring). In fact, a prior interest as an advocate might be a much stronger basis for an appearance of partiality than most monetary interests. In addition to possibly having acquired relevant information about this case from participation in the prior case, the Assigned Judge could have acquired an advocate's perspective, *i.e.*, a mind set about who were the "good guys" (the United States Attorney's office and the Absentee Shawnee) and who were the "bad guys" (the Potawatomi) in this dispute.

B. Failure to document in the record the extent of prior involvement.

Litigants are not allowed discovery relating to a judge's possible involvement in prior litigation. However, once a litigant has moved for recusal and cited an apparent conflict of interest, an assigned judge who denies such a motion has a duty to document in the record the precise nature of the involvement in the prior litigation. Once the judge makes a record disclosure in response to a § 455(a) motion, the challenging party can waive[28] the challenge if the disclosed facts do not justify disqualification or can more precisely articulate the reasons for disqualification. Without this disclosure, the parties cannot make an informed decision and an appellate court cannot properly review an order denying disqualification. A motion brought under § 455(a) "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 860. Thus, without the record disclosure, the parties and the public are merely left with the possible lack of partiality demonstrated by the challenge and a cloud of doubt arises over the proceedings.

Without an on-the-record disclosure of the "facts and circumstances known to the judge at the time," then the objective standard intended by Congress is impossible to attain and the decision is impossible to review on appeal.

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[28] "Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification." *Id.* § 455(e).

Instead of explaining why the recusal motion was denied, the District Court simply incorporated by reference the authorities cited in ASHA's brief[29] leaving the impression that the District Court relied on an incorrect standard for recusal under § 455(a).

The ASHA brief relied on *United States v. Gipson*, 835 F.2d 1323 (10th Cir. 1988), which held that a judge must have actively participated as counsel in the same proceeding for recusal to be appropriate under **§ 455(b)**. ASHA argued that since the Assigned Judge in the present case did not "participate as counsel" in the *Collier* litigation, then recusal was not warranted. *Gipson* never reached the merits of defendant's § 455(a) claim[30] because the defendant failed to preserve the issue for appeal. *Gipson*, 835 F.2d at 1325.

In *United States v. Greenspan*, 26 F.3d 1001 (10th Cir. 1994), the Tenth Circuit held that "Recusal under section 455 is to be judged on the record. It is not a question of either the government or the defendant bearing a burden of proof. Rather, recusal is an action taken by the judge, and the judge **must** document the reasons for his or her

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[29] Significantly, the Assigned Judge did not incorporate by reference the brief filed by her former law firm.

[30] Other cases in the Tenth Circuit and the Supreme Court also draw clear distinctions between Section 455(a) and (b). ("Section 455(b) is stricter than § 455(a) and is concerned with situations that may involve actual bias rather than § 455(a)'s concern with the **public perception of the judicial process**." *Harris v. Champion*, 15 F.3d 1538, 1571 (10th Cir. 1994) (emphasis added), quoting *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). The focus of section 455(a) is "not [on] the reality of bias or prejudice but **its appearance**." *Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995) (emphasis added), quoting *Liteky v. United States*, 510 U.S. 540 (1994)).

decision so that the decision may be reviewed, if necessary, by the appellate court." 26 F.3d at 1007 (emphasis added). The panel below noted that "the judge in this case did not create a record or document her decision not to recuse." App. 13-14. Although *Greenspan* is cited by the panel, no attempt is made to explain why its requirement that a challenged judge create a record is ignored except to imply that the Three Tribes failed to meet their burden. "[T]he Three Tribes disavow any knowledge that the district court judge personally participated in any way in the particular case." App. 14. *Greenspan* specifically held that the moving party did not have the burden. Here the Three Tribes pointed out the record appearances where the assigned judge was involved in a prior case involving similar parties and issues adverse to the Three Tribes. The Assigned Judge, who was then a United States Attorney, had plenary authority as a matter of law[31] over the prior litigation.

By failing to disclose the extent of Assigned Judge's knowledge, participation or lack thereof, in the prior litigation, the parties (and the public at large) cannot adequately determine, on an objective basis, whether the judge had a disqualifying interest. By allowing the judge to ignore the disclosure requirement under § 455(a), the Tenth Circuit has acted contrary to its own case law and to the decisions of this Court.

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[31] *See* 28 U.S.C. § 541, § 547. Although the Three Tribes know that the Assigned Judge's name appeared on the pleadings in the *Collier* case, they have no idea of the exact nature of the Assigned Judge's participation in the previous litigation. In denying recusal, the Assigned Judge provided no clue as to that participation. The Court is urged to look at this order. App. 20.

C. The Assigned Judge managed the Case improperly giving the appearance of a lack of impartiality.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In addition to a previous relationship to the parties and issues, the Assigned Judge's management of the case enhanced the appearance of partiality in favor of ASHA and the Federal Defendants.

- **No Hearing or Response Allowed** – The District Court's July 7 order denying the Three Tribes' request for a preliminary injunction was rendered immediately[32] after receiving a response from ASHA, without rescheduling the previously stricken hearing or otherwise giving the Three Tribes an opportunity to fully present the evidentiary basis for the temporary injunction sought, without deciding ASHA's jurisdictional challenge,[33] and without allowing the Federal Defendants to answer or otherwise plead to the allegations in the complaint.

- ***Sua Sponte* Order Stops Litigation** – Also on July 7, the District Court *sua sponte* stayed all proceedings in the case before all of the Defendants had answered.

- **Orders by Reference** – The September 19th order denying the Three Tribes' motion for disqualification was

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[32] ASHA filed their response on Thursday, July 3. July 4-6 was a holiday period. The District Court entered its order on July 7, Monday, the next working day after ASHA objected.

[33] "[I]ssues of fact * * * must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell v. Hood*, 327 U.S. 678, 682 (1946). A "court must first determine whether it has proper subject matter jurisdiction before addressing the substantive issues." *Taylor v. Appleton*, 30 F.3d 1365, 1366 (11th Cir. 1994).

one of three times the Assigned Judge substituted a reference to ASHA's brief in lieu of an on-the-record articulation of the reason for the action.[34] These "orders by reference" are not only bad form, they give the appearance of bias in favor of the party whose position the Assigned Judge's firm once championed and the party in whose favor the Assigned Judge was accused of being biased.

• **While Recusal Writ Pending, Assigned Judge Acts** – Because of the Assigned Judge's failure to act and appearance of bias toward ASHA and the Federal Defendants, the Three Tribes sought a writ of mandamus from the Tenth Circuit directing the Assigned Judge to recuse *first*, followed by an order to the *successor judge* to rule on ASHA's motion to dismiss. Two days before a response to the writ was due, the Assigned Judge granted ASHA's motion to dismiss. Prior to the filing of the writ, the Assigned Judge had 286 days to decide the motion to dismiss, but failed to do so even though advised pursuant to LCvR7.1(*l*) that the motion had been pending for over 90 days. Under these circumstances, the Assigned Judge should not have ruled on the motion to dismiss until the writ for recusal had been determined.

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[34] The District Court denied the Three Tribes' motion for disqualification "for the reasons stated in defendant Absentee Shawnee Housing Authority's September 15, 1997 response brief." App. 20. In the order granting ASHA's motion to dismiss, the District Court, without citing any independent authority or articulating any arguments in its own words, concluded, "Having considered the parties' arguments and authorities, the Court agrees with ASHA." App. 35. Finally, the District Court recently denied the Three Tribes' request for a final order "for the reasons stated by defendants in their respective response briefs filed May 22, 1998." App. 38.

• **Blocking Appeal by Not Entering Final Order** – The District Court's order granting ASHA's motion to dismiss was patently ambiguous under the stringent requirements of the finality doctrine, 28 U.S.C. § 1291, and was further evidence of the Assigned Judge's unwillingness to properly adjudicate this case. The District Court's order granting ASHA's motion to dismiss used language dismissing the complaint and not the action, contained a recital of pleadings and a lengthy record of prior proceedings, and was couched in speculative terms, such as "appears" and "if." The effect of the ambiguity on the finality of the order was to deny the Three Tribes relief without an appeal.

• **Court Sets Appellate Jurisdictional Trap** – Because the finality of the dismissal order was ambiguous, the Three Tribes moved the District Court on April 14, 1998, to enter a final order so that an expeditious appeal could be brought. Despite the fact that the Three Tribes' motion was essentially unopposed, on May 6 – two days after the 18-day time period had run to file a response to the April 14th motion – the District Court *sua sponte* directed all Defendants "to file a response to plaintiffs' [Appellants'] 'Motion for Entry of Final Order and Supporting Brief,' * * * by May 22, 1998." App. 77 (entry 52). This response date (Friday, May 22, 1998) was **one working day**[35] before expiration of the time to appeal

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[35] Essentially, the District Court *sua sponte* extended the response date to a basically unopposed motion from 18 to 38 days and, in so doing, jeopardized the parties' right to appeal.

from the March 24th order if the Three Tribes were wrong and the March 24th order was a final order. In other words, the Assigned Judge established a scenario that virtually guaranteed that the Three Tribes would lose their opportunity to appeal if their motion was denied. This expectation was subsequently validated when the District Court entered an order on May 28, denying the Three Tribes' motion for the entry of a final order "for the reasons stated by defendants in their respective response briefs filed May 22, 1998." App. 38. May 28 was three (3) days beyond the 60-day period for filing notice of appeal from the March 24th order.

In rejecting the Three Tribes' claim that the Assigned Judge's case management gave an appearance of partiality, the Tenth Circuit remarked that "merely adverse rulings can almost never constitute grounds for disqualification." App. 14. This statement misconstrued the Three Tribes' objection. The panel accurately described the Three Tribes' "second asserted ground for recusal" as "the timing and manner of her [the assigned judge's] rulings in this case." However, the panel rejected this ground based on an argument the Three Tribes never advanced, to-wit: "merely adverse rulings."

The Three Tribes would have *welcomed* a timely adverse ruling on ASHA's motion to dismiss which could have been appealed in the normal course. The Three Tribes' objection is not to adverse rulings but to the assigned judge's management of the case. Deciding the motion for a preliminary injunction before determining jurisdiction was not an adverse ruling.[36] The *sua sponte* stay order was not an adverse ruling. The failure to act on

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[36] Of course, the denial of the motion for preliminary injunction was an adverse ruling, but, in light of the subsequent jurisdictional ruling, purely a moot exercise.

a motion to dismiss after 287 days was not an adverse ruling. The failure to act on a pending motion after counsel (following local rules) notified the court that the motion had been pending for over 90 days was not an adverse ruling. The failure to act on the dismissal motion until forced by a pending writ was not an adverse ruling. The failure to require the federal defendants to respond to the complaint was not an adverse ruling. The failure to enter a final order or clearly declare its finality until after the appeal time had run was not an adverse ruling. These were not adverse rulings, but either failures to act or *sua sponte* actions. In any event, they were indications to a reasonable person that the assigned judge appeared to lack impartiality, *i.e.*, indications that the assigned judge would never give Three Tribes their day in court, would never allow them to be heard in a timely, meaningful manner as required by the decisions of this Court and by due process.

CONCLUSION

This Court should grant the petition for review by a writ of *certiorari*.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SAC & FOX NATION OF OKLAHOMA; THE HOUSING AUTHORITY OF THE SAC & FOX NATION OF OKLAHOMA; CITIZEN POTAWATOMI NATION; CITIZEN POTAWATOMI NATION HOUSING AUTHORITY; KICKAPOO TRIBE OF OKLAHOMA; HOUSING AUTHORITY OF THE KICKAPOO TRIBE OF OKLAHOMA,	)	
Plaintiffs-Appellants,	)	
v.	)	Nos. 97-6317 and 98-6212
ANDREW CUOMO, as Secretary of the United States Department of Housing and Urban Development; DOM NESSI, as Deputy Assistant Secretary for Native American Programs; WAYNE SIMS, Administrator of Southern Plaintifs Office of Native American Programs; THE HOUSING AUTHORITY OF THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CV-97-791-M)

(Filed Oct. 12, 1999)

Michael Minnis, Michael Minnis & Associates, P.C., Oklahoma City, Oklahoma, and Nathan H. Young, III, Tahlequah, Oklahoma (David McCullough of Michael Minnis & Associates, P.C., Oklahoma City, Oklahoma, with them on the briefs), for Appellants.

Arvo Q. Mikkanen, Assistant United States Attorney, Oklahoma City, Oklahoma (Patrick M. Ryan, United States Attorney, Oklahoma City, Oklahoma, with him on the briefs), for Federal Appellees.

F. Browning Pipestem (Dena L. Silliman with him on the briefs), F. Browning Pipestem & Associates, Norman, Oklahoma, for Appellee Absentee Shawnee Housing Authority.

Before **ANDERSON, McWILLIAMS**, and **MURPHY**, Circuit Judges.

ANDERSON, Circuit Judge.

This case involves a jurisdictional dispute between, on the one side, three Indian Tribes in Oklahoma (the

"Three Tribes")[1] and, on the other, the Housing Authority of a fourth tribe, and the officials in the Department of Housing and Urban Development ("HUD") who allocate Indian-housing funds in Oklahoma. The Three Tribes sued, seeking declaratory and injunctive relief against HUD and the Absentee Shawnee Housing Authority (ASHA). They complained that HUD has been funding ASHA housing projects that are outside ASHA's proper area of operation, and instead in theirs. They asked the district court to enjoin ASHA from conducting, and HUD from funding, activities outside its legal area of operation, and to order defendants to transfer to the Three Tribes all HUD projects in each of their respective jurisdictions.

The Three Tribes moved unsuccessfully for a preliminary injunction and immediately appealed its denial to this court. They also moved unsuccessfully to have the assigned district judge disqualify herself. Before we heard the interlocutory appeal, the district court dismissed the complaint on the alternative grounds of lack of federal-question jurisdiction and inability to join an indispensable party, the Absentee Shawnee Tribe ("AST"). The Three Tribes appealed that dismissal, and this court consolidated the two appeals. We have jurisdiction under 28 U.S.C. §§ 1291, 1292.

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[1] The plaintiff tribes are the Sac and Fox Nation Indian Tribe of Oklahoma, the Kickapoo Tribe of Oklahoma, and the Citizen Potowatomi Nation. While the housing authority of each tribe is also a named plaintiff, no one suggests that any issues are peculiar to them. This court will thus refer simply to "the Three Tribes."

Plaintiffs alleged four claims in their complaint, each seeking slightly different injunctive relief: (1) that against ASHA; (2) that requiring HUD to transfer existing projects to the Three Tribes; (3) that barring HUD from allocating future operating funds to ASHA for existing projects; and (4) that barring HUD from allocating future funds to ASHA to develop new housing. Because none of these claims pose a substantial federal question, we affirm the dismissal of the complaint. We also dismiss as moot the preliminary injunction appeal, vacate the dismissal for failure to join an indispensable party, and affirm the denial of the motion to disqualify the assigned judge.

BACKGROUND

The district court dismissed this case before any discovery, and the facts are thus scantily developed. We take all factual allegations in the complaint as true. *See Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995).

The Three Tribes each have trust lands and former reservation areas in parts of four counties in central Oklahoma. The AST has no former reservation in Oklahoma, but the United States holds some land in one of the counties in trust for it. The AST sponsors and controls ASHA, but ASHA is technically an agency of the State of Oklahoma, created by the Oklahoma Housing Authorities Act ("OHAA"). *See* Okla. Stat. Ann. tit. 63, § 1057; *see generally id.* §§ 1051-1084. The federal defendants ("HUD")[2] allocate low income housing funds to Indian

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[2] The federal defendants are HUD's Secretary, its Deputy Assistant Secretary for Native American Programs, and the

Tribes and Indian Housing Authorities ("IHAs") in Oklahoma.

Over the Three Tribes' protests, HUD has been, for years, funding ASHA's construction and operation of housing projects on lands located in the Three Tribes' former reservation areas and not held in trust for the AST. The Three Tribes claim that federal law limits an IHA's area of operation in Oklahoma to its sponsoring tribe's former reservation area or trust lands.

The Three Tribes filed a complaint for injunctive and declaratory relief in May 1997. They also moved for a preliminary injunction barring ASHA from continuing, and HUD from funding, operations outside ASHA's legal area of operation. The court set a hearing on the preliminary injunction motion, but later struck the hearing "to be re-set . . . after June 26, 1997." ASHA then moved to dismiss. It argued that the court lacked subject matter jurisdiction, as the case turned not on any federal question but on the state-law question of how to define ASHA's area of operation, and that the AST was a necessary party, unable to be joined because of its sovereign immunity.

The court denied the preliminary injunction on July 7, without having rescheduled the stricken hearing. It also *sua sponte* stayed all further proceedings pending resolution of ASHA's motion to dismiss. The Three Tribes, complaining of their inability to conduct discovery, moved the court to lift the stay or, in the alternative,

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Administrator of its Southern Plains Office of Native American Programs.

to lift it for the limited purpose of considering a motion to disqualify the assigned judge. The court did the latter, considered the motion, and denied it.

In September 1997, the Three Tribes appealed the denial of the preliminary injunction. After this court denied their motions to expedite the appeal and to enter an injunction pending appeal, the parties filed their briefs.

The district court, meanwhile, had not acted on ASHA's motion to dismiss. In February 1998 the Three Tribes notified the court that it had been pending for over 90 days. Three weeks later, they petitioned this court for a writ of mandamus directing the district court to lift the stay, recuse the assigned judge, and require the new judge to rule on the motion to dismiss. Six days later, the district court granted the motion to dismiss. This court then denied the mandamus petition as moot. After a dispute over whether the order granting ASHA's motion to dismiss had been final, the Three Tribes appealed that order. We consolidated the two appeals.

DISCUSSION

I. Subject-Matter Jurisdiction

We review de novo a dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction. *See Painter v. Shalala*, 97 F.3d 1351, 1355 (10th Cir. 1996). We accept as true the complaint's uncontroverted factual allegations when, as in this case, the court held no evidentiary hearing. *See Wenz*, 55 F.3d at 1505.

The only asserted basis for subject-matter jurisdiction is the presence of a federal question.[3] A plaintiff creates federal-question jurisdiction by means of a "well-pleaded complaint establish[ing] either that federal law creates the cause of action or that the plaintiff's right to relief . . . depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of Calif. v. Construction Laborers Vacation Trust for So. Calif.*, 463 U.S. 1, 27-28 (1983). "[T]he party invoking federal jurisdiction bears the burden of proof." *Marcus v. Kansas*, 170 F.3d 1305, 1309 (10th Cir. 1999) (quoting *Penteco Corp. v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991)). Moreover, federal question jurisdiction must appear on the face of the complaint and "[t]he complaint must identify the statutory or constitutional provision under which the claim arises, and allege sufficient facts to show that the case is one arising under federal law." *Martinez v. United States Olympic Comm.*, 802 F.2d 1275, 1280 (10th Cir. 1986).

In dismissing the complaint for lack of jurisdiction, the district court held:

> plaintiffs do not plead any constitutional provision, federal law or treaty upon which federal

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[3] The Three Tribes alleged jurisdiction under 28 U.S.C. §§ 1331 and 1362. The former is the federal-question jurisdictional statute, while the latter affords jurisdiction of suits by Indian Tribes that involve federal questions. Congress enacted § 1362 before it had amended § 1331 to eliminate the amount-in-controversy requirement. Its purpose was to exempt Indian Tribes from that requirement, and it is well established that invoking § 1362 does not change a plaintiff tribe's duty to show that its complaint raises a substantial federal question. *See e.g., Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1058-59 (10th Cir. 1993).

> question jurisdiction could rest. To the contrary, the only law at issue appears to be the [OHAA], since the gist of plaintiffs' complaint is that ASHA is allegedly developing low income homes outside its "area of operation" as set out in the [OHAA].

Order at 9-10, Appellants' App. (No. 98-6212) at 40-41. We agree.

We first affirm the dismissal of the claims against ASHA, as those claims clearly present no federal question. The Three Tribes suggest no cause of action against ASHA that arises under or depends on the construction of any federal law. The Three Tribes' brief on appeal virtually concedes that only their claims against the federal defendants could conceivably pose a federal question.

We also hold that plaintiffs' complaint fails to articulate a substantial federal question with respect to those federal defendants. Only two paragraphs in the complaint even mention HUD's conduct:

> 24. Every housing unit operated by the ASHA must be approved and funded by HUD.
>
> 25. Defendant Secretary of HUD and Defendant Southern Plains Office of Native American Programs by and through Defendant Sims have been continually advised of the ASHA's illegal encroachments on other tribes' areas, but have refused to halt the encroachments, and if not enjoined, will continue to allow these encroachments and allocate federal funding to the ASHA based thereon.

Complaint at ¶¶ 24, 25, Appellants' App. (No. 97-6317) at 5. Noticeably absent from those paragraphs are any references to federal laws, regulations, treaties, etc. which plaintiffs claim HUD has violated, or even any general description of how HUD is allegedly responsible for the "encroachments," not to mention how any claimed violation of any law or regulation could confer federal question jurisdiction.[4]

In response to ASHA's motion to dismiss in the district court, grounded in part on the lack of a federal question, plaintiffs only *specifically* referred to those two paragraphs in the complaint. *See* Pls.' Br. in Opp'n to the ASHA Mot. to Dismiss at 5 n.13, Appellants' App. at 5. They supplemented that reference with general statements such as "[a]llocation of federal funding by the Federal Defendants is certainly a federal question" and "[t]he proper administration of a federal program is obviously a controversy arising under federal law." *Id.* at 5. Again, plaintiffs directed the district court to no specific federal law or regulation which they claimed was violated or which conferred federal question jurisdiction, nor did they articulate even in general terms how HUD could be liable for the claimed illegal activities of ASHA.

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[4] Perhaps it could be argued that plaintiffs' complaint invokes the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. But plaintiffs' complaint never mentions the APA, and at oral argument before this court plaintiffs' counsel, when asked directly whether he could have brought an action under the APA, specifically stated that he did not believe he could. Thus, it seems clear that plaintiffs did not intend their complaint to allege a cause of action under the APA.

While plaintiffs' brief to this court on appeal attempts, for the first time, to explain how paragraphs 12 through 27 of the complaint also allege violations of federal regulations, in fact the clear, and only, focus of those paragraphs is on ASHA's "operational/jurisdictional areas" as defined by state law, and on ASHA's claimed "encroachments" on plaintiffs' "operational/jurisdictional areas," also as defined by state law. It is therefore entirely understandable that the district court concluded that plaintiffs' complaint articulated no federal question, even against the federal defendants. It is only in a footnote that, finally, in their appellate brief, plaintiffs reference the particular federal regulations they claim the federal defendants have violated. *See* Appellants' Br. at 10-11 n.31. When asked the direct question at oral argument, plaintiffs' counsel asserted that the specific federal regulation allegedly violated is 24 C.F.R. § 1000.302, the regulation which made its first belated appearance in footnote 31 of plaintiffs' appellate brief.

We acknowledge that, in general, we apply liberal rules of pleading, particularly where a party proceeds pro se. Additionally, pleadings may be amended, including on appeal, to cure defective allegations of jurisdiction. *See* 28 U.S.C. § 1653. However, in this case, plaintiffs were represented by counsel. No formal amendment was ever sought. Even after a motion to dismiss had been filed in district court, specifically alleging that plaintiffs failed to plead the existence of a federal question, plaintiffs relied upon vague general statements about federal funding by HUD. But the fact that federal funds are involved is, by itself, insufficient to establish the existence of a federal question. *See Eastern Shoshone Tribe v. Northern Arapaho*

Tribe, 926 F.Supp. 1024, 1031 (D. Wyo. 1996); *see also United States ex rel. Gen. Rock & Sand Corp. v. Chuska Dev. Corp.*, 55 F.3d 1491 (10th Cir. 1995). It was not until after the district court dismissed their complaint that plaintiffs finally decided what they needed to argue to avoid such dismissal and fleshed out the nature of their asserted federal question.

We decline to construe plaintiffs' appellate brief as an amendment of their complaint. While we have permitted such appellate amendment in one prior case, *Martinez*, that case is readily distinguishable from this one. In *Martinez*, plaintiff's complaint alleged that "federal questions are involved," but failed to particularly allege any issue regarding the validity, construction or application of any federal statute. *Martinez*, 802 F.2d at 1280. However, in oral argument before the district court on a motion to dismiss, plaintiff argued that a specific federal statute created a private cause of action supporting her complaint. Defendants, thus, were on notice of the jurisdictional allegations and had an opportunity to respond both before the district court and in their appellate brief. After noting that "these allegations should have appeared in [plaintiff's] complaint," we treated the complaint, for purposes of the appeal, as "having been amended to include them." *Id.* In *Martinez*, therefore, the specific federal cause of action was identified and argued to the *district court*, as well as on appeal. Here, the specifics of plaintiffs' asserted federal cause of action were not argued until on appeal and, even then, only in the most vague and opaque fashion and for the very first time in a footnote in their reply brief.

Accordingly, *Martinez* does not establish any general rule about appellate amendment of pleadings to satisfy jurisdictional requirements; rather, it represents a narrow, case-specific, exception to our general rules of pleading.[5] To interpret *Martinez* any other way would unfairly prejudice the federal defendants because they would have no practical opportunity to respond to the jurisdictional allegations made by the Three Tribes. Moreover, it would unfairly burden the district court to expect that court to independently identify the correct federal jurisdictional basis or risk reversal on appeal.

In sum, the district court in this case correctly dismissed plaintiffs' complaint for failing to establish the existence of federal-question jurisdiction. "[W]hen the question to be considered is one involving the jurisdiction of a federal court, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998). No such affirmative showing was made here.

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[5] Indeed, this court has never relied upon *Martinez* for appellate amendment of jurisdictionally deficient complaints. The few cases that have cited *Martinez* have quoted the *Martinez* language we quote, *supra*, concerning the requirement that the complaint identify the statutory or constitutional basis for federal jurisdiction. *See, e.g., Calon v. Apfel*, No. 98-3190, 1999 WL 415340 (10th Cir. April 26, 1999) (unpublished); *Lohse v. Felker*, No. 96-1540, 1997 WL 441662 (10th Cir. Aug. 1, 1997) (unpublished); *Andress v. Deasy*, No. 97-1041, 1997 WL 299294 (10th Cir. June 5, 1997) (unpublished). This provides further support for a narrow construction of *Martinez*.

II. Preliminary Injunction

This consolidated appeal includes the Three Tribes' interlocutory appeal from the order declining to preliminarily enjoin ASHA and HUD from conducting or funding operations in the disputed area. Our disposition of this case renders that appeal moot.

III. Motion to Disqualify

The Three Tribes also appeal the denial of their motion to disqualify the assigned judge on the grounds of an "appearance of bias." *See* 28 U.S.C. § 455(a). We generally review such denials for an abuse of discretion. *See United States v. Lowe*, 106 F.3d 1498, 1504 (10th Cir. 1997). However, because the judge in this case did not create a record or document her decision not to recuse, we review the denial de novo. *See United States v. Greenspan*, 26 F.3d 1001, 1007 (10th Cir. 1994) (noting that a judge "must document the reasons for his or her decision [on recusal] so that the decision may be reviewed, if necessary, by an appellate court"). We affirm the court's denial in this case.

A federal judge must recuse herself "in any proceeding in which [her] impartiality might be reasonably questioned." 28 U.S.C. § 455(a). The court must decide "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993) (quotations omitted). The Three Tribes argue the district court was biased (1) because of her past service as United States Attorney for the Western District of Oklahoma at a time when that office represented the Bureau of

Indian Affairs in a particular case; and (2) because of the timing and manner of her rulings in this case.

We reject the first argument, since the Three Tribes expressly disavow any knowledge that the district court judge personally participated in any way in the particular prior case. *See United States v. Gipson*, 835 F.2d 1323, 1326 (10th Cir. 1988). We reject their second asserted ground for recusal, noting that, as the Tribes concede, merely adverse rulings can almost never constitute grounds for disqualification, *see Cooley*, 1 F.3d at 993-94, and the Tribes cite no authority for their claim that the time and manner of her rulings creates a reasonable doubt about impartiality, absent any other indicia of bias or partiality. Nothing in the district court's rulings in this case provides a reasonable basis from which to infer partiality. The assigned judge properly denied the motion to disqualify.

CONCLUSION

For the foregoing reasons, we AFFIRM the dismissal of the complaint for lack of federal-question jurisdiction, we DISMISS AS MOOT the appeal from the order denying a preliminary injunction, we AFFIRM the denial of the motion to disqualify, and we VACATE the district court's dismissal for failure to join an indispensable party.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SAC & FOX NATION OF OKLAHOMA; THE HOUSING AUTHORITY OF THE SAC & FOX NATION OF OKLAHOMA; CITIZEN POTAWATOMI NATION; CITIZEN POTAWATOMI NATION HOUSING AUTHORITY; KICKAPOO TRIBE OF OKLAHOMA; and HOUSING AUTHORITY OF THE KICKAPOO TRIBE OF OKLAHOMA;	)	Case No. CIV-97-0791-M
Plaintiffs,	)	
vs.	)	
ANDREW CUOMO as SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; DOM NESSI, as DEPUTY ASSISTANT SECRETARY for NATIVE AMERICAN PROGRAMS; WAYNE SIMS, ADMINISTRATOR of SOUTHERN PLAINS OFFICE OF NATIVE AMERICAN PROGRAMS; and THE HOUSING AUTHORITY OF THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendants.	)	

MINUTE ORDER STAYING FURTHER PROCEEDINGS

(Filed July 7, 1997)

Pending resolution of the motion to dismiss filed June 4, 1997, by defendant Housing Authority of the Absentee Shawnee Tribe of Oklahoma, all further proceedings in this case are stayed.

IT IS SO ORDERED this 7th day of July, 1997.

/s/ Vicki Miles LaGrange
VICKI MILES-LaGRANGE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SAC & FOX NATION OF OKLAHOMA; THE HOUSING AUTHORITY OF THE SAC & FOX NATION OF OKLAHOMA; CITIZEN POTAWATOMI NATION; CITIZEN POTAWATOMI NATION HOUSING AUTHORITY; KICKAPOO TRIBE OF OKLAHOMA; and HOUSING AUTHORITY OF THE KICKAPOO TRIBE OF OKLAHOMA;	)	Case No. CIV-97-0791-M
Plaintiffs,	)	
vs.	)	
ANDREW CUOMO as SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; DOM NESSI, as DEPUTY ASSISTANT SECRETARY for NATIVE AMERICAN PROGRAMS; WAYNE SIMS, ADMINISTRATOR of SOUTHERN PLAINS OFFICE OF NATIVE AMERICAN PROGRAMS; and THE HOUSING AUTHORITY OF THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendants.	)	

ORDER LIFTING STAY FOR LIMITED PURPOSE

(Filed Aug. 20, 1997)

On July 14, 1997 and July 15, 1997, plaintiffs filed motions, a "correction and supplement" to their motion, and a "corrected motion," the essence of which is plaintiffs' request for an order lifting the stay that was entered July 7, 1997, either entirely or for the limited purpose of allowing plaintiffs to file (1) a motion for recusal and (2) a motion to alter or amend the order entered July 7, 1997, which denied plaintiffs' motion for preliminary injunction.

Having considered the matter, the Court GRANTS plaintiffs' corrected motion to lift stay [docket number 36] such that the stay is lifted for the limited purpose of considering the recusal issue. Accordingly, plaintiffs are granted leave to file their motion for recusal by August 25, 1997, and defendants shall file their response(s) to the motion by September 15, 1997. The stay remains in effect for all other purposes.

Further, as requested by plaintiffs, their July 14, 1997 motion to alter or amend judgment [docket number 34] and their July 14, 1997 motion to lift stay [docket number 35] are WITHDRAWN.

IT IS SO ORDERED this 20th day of August, 1997.

/s/ Vicki Miles LaGrange
VICKI MILES-LaGRANGE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SAC & FOX NATION OF OKLAHOMA; THE HOUSING AUTHORITY OF THE SAC & FOX NATION OF OKLAHOMA; CITIZEN POTAWATOMI NATION; CITIZEN POTAWATOMI NATION HOUSING AUTHORITY; KICKAPOO TRIBE OF OKLAHOMA; and HOUSING AUTHORITY OF THE KICKAPOO TRIBE OF OKLAHOMA;	)	Case No. CIV-97-0791-M
Plaintiffs,	)	
vs.	)	
ANDREW CUOMO as SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; DOM NESSI, as DEPUTY ASSISTANT SECRETARY for NATIVE AMERICAN PROGRAMS; WAYNE SIMS, ADMINISTRATOR of SOUTHERN PLAINS OFFICE OF NATIVE AMERICAN PROGRAMS; and THE HOUSING AUTHORITY OF THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendants.	)	

ORDER

(Filed Sep. 19, 1997)

Plaintiffs' motion for disqualification, filed August 22, 1997, is DENIED for the reasons stated in defendant Absentee Shawnee Housing Authority's September 15, 1997 response brief.

IT IS SO ORDERED this 19th day of September, 1997.

/s/ Vicki Miles-LaGrange
VICKI MILES-LaGRANGE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SAC & FOX NATION OF OKLAHOMA; THE HOUSING AUTHORITY OF THE SAC & FOX NATION OF OKLAHOMA; CITIZEN POTAWATOMI NATION; CITIZEN POTAWATOMI NATION HOUSING AUTHORITY; KICKAPOO TRIBE OF OKLAHOMA; and HOUSING AUTHORITY OF THE KICKAPOO TRIBE OF OKLAHOMA;	)	Case No. CIV-97-0791-M
Plaintiffs,	)	
vs.	)	
ANDREW CUOMO as SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; DOM NESSI, as DEPUTY ASSISTANT SECRETARY for NATIVE AMERICAN PROGRAMS; WAYNE SIMS, ADMINISTRATOR of SOUTHERN PLAINS OFFICE OF NATIVE AMERICAN PROGRAMS; and THE HOUSING AUTHORITY OF THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendants.	)	

ORDER

(Filed Mar. 24, 1998)

Before the Court is defendant The Housing Authority of the Absentee Shawnee Tribe of Oklahoma's motion to dismiss, filed June 4, 1997 [doc. no. 20]. Plaintiffs responded in opposition on June 23, 1997 [doc. no. 26]. The proceedings have been stayed since July 7, 1997, pending resolution of the jurisdictional issues raised in the motion to dismiss.[1]

I. The Parties

A. Plaintiffs

The plaintiffs include three Tribes and their respective Housing Authorities. Specifically, the plaintiffs are:

1. *Tribes*

   a. Sac and Fox Nation of Oklahoma,
   b. Citizen Potawatomi Nation,
   c. Kickapoo Tribe of Oklahoma.

   These three Tribes will be referred to collectively as the "plaintiff Tribes."

2. *Housing Authorities*

   a. Housing Authority of the Sac and Fox Nation of Oklahoma ("SFHA"),
   b. Citizen Potawatomi Nation Housing Authority ("CPHA"),

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[1] The stay of proceedings was lifted, on August 20, 1997, for the limited purpose of considering plaintiffs' motion for disqualification. That motion was denied by a written order filed September 19, 1997.

c. Housing Authority of the Kickapoo Tribe of Oklahoma ("KHA").

These three Housing Authorities will be referred to collectively as the "plaintiff Housing Authorities."

B. Defendants

The defendants include three officials with the United States Department of Housing and Urban Development ("HUD") and one Housing Authority. Specifically, the defendants are:

1. *HUD Defendants*
   a. Andrew Cuomo, Secretary of HUD.
   b. Dom Nessi, Deputy Assistant Secretary for Native American Programs,
   c. Wayne Sims, Administrator of the Southern Plains Office of Native American Programs.

   These three defendants will be referred to collectively as the "Federal Defendants."

2. *Housing Authority*
   a. Housing Authority of the Absentee Shawnee Tribe of Oklahoma ("ASHA").

II. Procedural History

Plaintiffs filed their complaint May 13, 1997, together with a motion for preliminary injunction. The following day, May 14, 1997, they filed an application for a hearing on the motion for preliminary injunction. On May 19,

1997, before the defendants had answered or otherwise responded to the complaint, the Court entered an order which granted plaintiffs' application for hearing, scheduled the hearing on May 29, 1997, ordered plaintiffs to provide a copy of the order to defendants "within three days," and ordered defendants to respond to the motion for preliminary injunction by May 29, 1997.

On May 23, 1997, the Federal Defendants entered a special appearance for the purpose of (a) moving for an extension of time to respond to the motion for preliminary injunction, (b) moving to continue the hearing, and (c) moving for referral of the case to a settlement judge. Plaintiffs filed their objections to the Federal Defendants' motion on May 27, 1997. Subsequently on May 27, 1997, the Court entered an order which granted the Federal Defendants' motion. The May 27, 1997 order extended the deadline for defendants' response to plaintiffs' motion for preliminary injunction from May 27 to June 26, 1997, struck the hearing that had been scheduled for May 29, 1997, to be reset by the Court on a date after June 26, 1997, and referred the case for settlement conference.[2]

On June 4, 1997, ASHA filed its motion to dismiss the complaint for lack of jurisdiction, lack of standing and failure to join an indispensable party. Plaintiffs filed their response brief June 23, 1997.

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[2] On May 27, 1997, ASHA filed a similar motion to continue the hearing and for an extension of time to respond to plaintiffs' motion for preliminary injunction, which the Court granted by separate order entered May 27, 1997. Plaintiffs' response to ASHA's motion was filed May 28, 1997.

Also on June 23, 1997, ASHA sought another extension of time within which to respond to plaintiffs' motion for preliminary injunction. Plaintiffs responded in opposition the same day. On June 24, 1997, the Court granted the requested extension and extended the deadline from June 26 to July 3, 1997.

On June 26, 1997, the Federal Defendants filed their response to plaintiffs' motion for preliminary injunction. ASHA filed its response on July 3, 1997. After reviewing the parties' arguments and authorities, the Court entered an order July 7, 1997 denying plaintiffs' motion for preliminary injunction without a hearing.[3] Also on July 7, 1997, the Court *sua sponte* entered an order staying all proceedings pending resolution of the jurisdictional issues raised in ASHA's motion to dismiss.

Thereafter, on July 15, 1997, plaintiffs filed a motion to lift the stay. Plaintiffs urged the Court to either lift the stay for all purposes or, in the alternative, to lift the stay for the limited purpose of allowing plaintiffs to file a motion to recuse and a motion to vacate the order denying their motion for preliminary injunction. Defendants did not file any response to this motion. On August 20, 1997, the Court entered an order lifting the stay for the limited purpose of allowing plaintiffs to file their motion to recuse.

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[3] The Federal Defendants, in their response brief, pointed out among other things that ASHA had been doing what the plaintiffs' complained of in 1997, since 1966. Special Appearance and Federal Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at pp. 4-6 (June 26, 1997).

Plaintiffs filed their motion to recuse on August 22, 1997, and on September 4, 1997, filed their Notice of Appeal from the July 7, 1997 order denying their motion for preliminary injunction.[4]

On September 15, 1997, ASHA filed its response to plaintiffs' motion to recuse. The Federal Defendants filed their response on September 16, 1997. On September 19, 1997, the Court entered an order denying the motion to recuse.

On or about March 17, 1998, plaintiffs filed in the Tenth Circuit a Petition for Writ of Prohibition and/or Writ of Mandamus.

III. The Complaint

Since the complaint is not lengthy, the Court finds it worthwhile to reproduce it essentially in its entirety here:

COMPLAINT

> Comes now the plaintiffs . . . , and for their cause of action against the defendants, in and by their attorneys, in seeking both declaratory and injunctive relief allege and state as follows:
>
> PARTIES
>
> 1. The Sac and Fox Nation is a federally recognized Indian Tribe located in the Western District of Oklahoma.

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[4] On September 30, 1997, the Tenth Circuit entered an order denying plaintiffs/appellants' motion for an injunction pending appeal. *See* Order, *Sac and Fox Nation et al. v. Andrew Cuomo, et al.*, Appeal No. 97-6317 (10th Cir. September 30, 1997).

2. The Housing Authority of the Sac and Fox Nation is a tribal agency created pursuant to the Sac and Fox Housing Act of 1993. It is located within the Western District of Oklahoma.

3. The Citizen Potawatomi Nation is a federally recognized Indian Tribe located in the Western District of Oklahoma.

4. The Citizen Potawatomi Nation Housing Authority is an entity created by the Citizen Potawatomi Nation.

5. The Kickapoo Tribe of Oklahoma is a federally recognized Indian Tribe located in the Western District of Oklahoma.

6. The Housing Authority of the Kickapoo Tribe of Oklahoma is an entity created by the Kickapoo Tribe of Oklahoma.

7. Andrew Cuomo is the Secretary of the United States Department of Housing and Urban Development which does business through the Southern Plains Office of Native American Programs of HUD located in Oklahoma City.

8. Dom Nessi is the Deputy Assistant Secretary for Native American Programs in Denver, Colorado.

9. Wayne Sims is the Administrator of the Southern Plains Office of Native American Programs located in Oklahoma City and former Executive Director of the Absentee Shawnee Housing Authority.

10. The Housing Authority of the Absentee Shawnee Tribe was created pursuant

to the Oklahoma Housing [Authorities] Act (63 O.S. § 1057) and is located in the Western District. Th[is] defendant is totally funded by HUD.

VENUE AND JURISDICTION

11. All the parties are located in the Western District. 28 U.S.C. § 1391(e). Jurisdiction is based upon 28 U.S.C. § 1331 and 28 U.S.C. § 1362.

OPERATIVE FACTS

12. The operational/jurisdictional area of the SFHA is the boundaries of the original Sac and Fox Reservation in Oklahoma.

13. The operational/jurisdictional area of the CPHA is the boundaries of the Potawatomi Reservation in Oklahoma.

14. The operational/jurisdictional area of the KHA is the former reservation boundaries of the Kickapoo Tribe.

15. The [Oklahoma] Housing Authorit[ies] Act (63 O.S. §§ 1051 *et seq.*) determines the operational/jurisdictional area of an Indian housing authority created under Oklahoma law.

16. The operational area of an Indian housing authority created under state law is the area within the sponsoring tribe's former reservation boundaries.[5]

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[5] Here plaintiffs cite a written order by the state district court for the district of Ottawa County, Oklahoma, dated June 2, 1980. Plaintiffs attached a copy of this order to their complaint. The state district court's order is not binding precedent.

17. The tribal sponsor of the ASHA is the Absentee Shawnee Tribe of Oklahoma which has no former reservation in Oklahoma.[6]

18. The ASHA has operated and continues to operate outside of its operational/jurisdictional area in the area of territory of the plaintiffs and other tribes, including the Seminole Tribe.

19. Furthermore, the ASHA is planning to construct new projects outside of its operational/jurisdictional area within the operational/jurisdictional area and territory of the plaintiffs.

20. The plaintiffs have not given the ASHA permission to operate in the plaintiffs' area of operational/jurisdiction.

21. The ASHA has been advised by its own attorney that the ASHA has "no legal authority" to operate in other tribe's jurisdictions.[7]

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[6] Here, plaintiffs cite an unpublished decision by the federal district court for the Western District of Oklahoma, dated May 22, 1996, in *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier,* Case No. CIV-92-2161-R. Plaintiffs did not attach a copy of this order to their complaint. (An earlier decision in that lawsuit, which dismissed the complaint for failure to join an indispensable party, was reversed by the Tenth Circuit in *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier,* 17 F.3d 1292 (10th Cir. 1994), and the case was remanded.) The district court's May 22, 1996 order is not binding precedent.

[7] Here, plaintiffs cite a memorandum of legal opinion from Henry A. Ware to Marilyn Oxford, dated April 19, 1994, which gives Mr. Ware's answer to the following question: whether the

22. The ASHA's encroachments on plaintiffs' operational/jurisdictional areas have caused and will continue to cause threats to peace and to the civil rights of the housing residents unless enjoined by this court.

23. The ASHA's encroachments include illegally bringing actions in Absentee Shawnee Tribal Court against non-Indians and non-tribal members for incidents on lands outside of the jurisdiction of the Absentee Shawnee Tribe of Oklahoma.

24. Every housing unit operated by the ASHA must be approved and funded by HUD.

25. Defendant Cuomo and defendant Sims have been continually advised of the ASHA's illegal encroachments on other tribes' areas, but have refused to halt the encroachments, and if not enjoined, will continue to allow these encroachments and allocate federal funding to the ASHA based thereon.

26. Plaintiffs have no adequate remedy at law.

RELIEF

27. The Plaintiffs hereby request the District Court award them the following items of relief:

Absentee Shawnee Tribal Court ha[s] jurisdiction to evict individual MHO participants, who reside outside the territorial reservation of the Absentee Shawnee Tribe. Plaintiffs attached a copy of this memorandum to their complaint. Mr. Ware's memorandum is not binding precedent.

A. Render a temporary and permanent injunction against HUD and the Southern Plains Office of Native American Programs, from allocating funding and allowing the operation of the ASHA outside of ASHA's legal area of operation;

B. Render a temporary and permanent injunction prohibiting the ASHA from operating outside its legal area of operation;

C. Enter an order that defendants are to transfer all HUD projects in plaintiffs' operational/jurisdictional area to plaintiffs;

D. Enter a judgment of declaratory relief determining the rights and liabilities of all the parties; and

E. Award any other relief to the plaintiffs it deems necessary and just.

Complaint (May 13, 1997) (as "corrected" on May 14, 1997).

IV. Federal Question Jurisdiction

Plaintiffs rely on 28 U.S.C. § 1331 and 28 U.S.C. § 1362 as the bases for this Court's jurisdiction. Both statutes expressly require that the matter in controversy "arise under the Constitution, laws, or treaties of the United States." Merely citing the federal question statutes in the complaint is not sufficient to demonstrate that the Court has jurisdiction. Rather, the complaint must be examined, and only those parts of the complaint that directly and necessarily relate to the plaintiffs' cause of action should be considered. *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 481 (10th Cir. 1975).

A case arises under federal law only when "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiffs right to relief depends on resolution of a substantial question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983). Moreover, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiffs cause of action." *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1058 (10th Cir. 1993) (quoting *Gully v. First National Bank*, 229 U.S. 109, 112 (1936)).

A careful review of the complaint in this case reveals that plaintiffs do not plead any constitutional provision, federal law or treaty upon which federal question jurisdiction could rest. To the contrary, the only law at issue appears to be the Oklahoma Housing Authorities Act, 63 O.S. § 1051 *et seq.*, since the gist of plaintiffs' complaint is that ASHA is allegedly developing low income homes outside its "area of operation" as set out in the Oklahoma Housing Authorities Act.[8]

In its motion to dismiss for lack of federal question jurisdiction, ASHA contends the resolution of the definition of ASHA's area of operation is a question of state law, not federal law. ASHA further argues that the fact

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[8] In paragraph 10 of their complaint, plaintiffs state that ASHA was "created pursuant to the Oklahoma Housing [Authorities] Act," and in paragraph 15, plaintiffs state that the Oklahoma Housing Authorities Act "determines the operational/jurisdictional area of an Indian housing authority created under Oklahoma law." Complaint (May 13, 1997) (as "corrected" May 14, 1997).

ASHA receives funding from HUD and enters into contracts with HUD does not invoke federal jurisdiction over plaintiffs' complaint. As pointed out by ASHA, the mere presence of the federal issue in a state cause of action does not automatically confer federal question jurisdiction. *Merrill Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 810 (1986).

In response to ASHA's motion to dismiss for lack of federal question jurisdiction, plaintiffs state:

> allocation of federal funding by the Federal Defendants is certainly a federal question. What are the former reservation boundaries of an Indian tribe is certainly a question arising under treaties between the United States and other Indian tribes. The proper administration of a federal program is obviously a controversy arising under federal law. These questions are all raised as allegations in the complaint.
>
> This case involves relationships among Indian tribes, an Indian housing authority, and a federal agency. Since this nation was created, the authority to resolve disputes about these relationships has constitutionally been assigned to the federal government [quoted language from *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 562 (1832) omitted].
>
> The attempt by the ASHA to characterize the present dispute as a state law question is contrary to established jurisprudence. This case dispute clearly calls for construction of Indian law, i.e., when may an Indian housing authority properly operate within the former reservation boundaries of non-sponsoring tribes. "[C]ourts

> have consistently determined that the interpretation of Indian law is a matter of federal law." *Tohono O'odham Nation v. Schwartz*, 837 F. Supp. 1024, 1029 (D. Ariz. 1993).

Plaintiffs' Response Brief at 5-6.

Having carefully considered the parties' arguments and their cited authorities, the Court finds and concludes plaintiffs' complaint does not "arise under" federal law. The complaint fails to contain well-pleaded allegations that federal law creates plaintiffs' cause of action or that plaintiffs' right to relief depends on resolution of a substantial question of federal law. It does not appear from the complaint that a right created by the Constitution, laws or treaties of the United States is an essential element of plaintiffs' cause of action. Accordingly, the complaint must be dismissed for lack of federal question jurisdiction.

V. Indispensable Party

ASHA next argues that if in fact this is not a dispute about what is ASHA's proper area of operation pursuant to the Oklahoma Housing Authorities Act, but is instead a dispute between the plaintiff Tribes and the Absentee Shawnee Tribe as to their respective tribal jurisdictions, then the unnamed Absentee Shawnee Tribe is an indispensable party which cannot be joined, and the complaint must be dismissed under Rule 19 of the Federal Rules of Civil Procedure.

ASHA makes the following argument. ASHA was created under state law more than thirty-two years ago and exercises jurisdiction independent of the absentee

Shawnee Tribe. ASHA provides low income housing to members of the Absentee Shawnee Tribe and members of other tribes. If the Court were to grant plaintiffs' requested relief, the Absentee Shawnee Tribe's interest in providing safe, sanitary housing for its members and members of other tribes would be prejudiced. ASHA states: "If, indeed, in the alternative, the issue is tribal jurisdiction and is actually a controversy between the involved tribes, the ASHA, a state created agency, cannot protect the interests of a third party, the Absentee Shawnee Tribe. The Absentee Shawnee Tribe's interest would be greatly prejudiced should relief be granted without the presence of the Absentee Shawnee Tribe." ASHA's Brief at pp. 18-19 (June 4, 1997).

In response, plaintiffs argue the Absentee Shawnee Tribe is not only not an indispensable party, it is not even a necessary party. Plaintiffs state that "ASHA has completely misstated the focus of this case. This case is concerned about the Federal Defendants' recognition for funding purposes of an illegal area of operation for a housing authority and about ASHA's acting outside its proper area of operation. If the Absentee Shawnee [Tribe] want[s] to intervene to defend ASHA's jurisdictional claims, they may so move, but they are certainly not a necessary party for determining ASHA's area of operation. [citing *Collier,* 17 F.3d 1292 (10th Cir. 1994)]." Plaintiffs' Response Brief at 6-7.

Having considered the parties' arguments and authorities, the Court agrees with ASHA. Although plaintiffs attempt to put the focus on the propriety, or not, of HUD's funding of ASHA, the propriety of such funding appears, from the complaint, to depend on a resolution of

what is ASHA's proper area of operation under the Oklahoma Housing Authorities Act.

VI. Conclusion

This case appears to be either a dispute about what is ASHA's proper area of operation, which is a matter to be determined under the Oklahoma statute under which ASHA was created, or it is a dispute between the plaintiff Tribes and the Absentee Shawnee Tribe about tribal jurisdiction. If it is the former, there is a lack of federal question jurisdiction. If it is the latter, the Absentee Shawnee Tribe is an indispensable party that cannot be joined on account of sovereign immunity.

Accordingly, defendant ASHA's Motion to Dismiss [doc. no 20] is GRANTED. The complaint is dismissed for lack of federal question jurisdiction or, in the alternative, for failure to join an indispensable party, the Absentee Shawnee Tribe of Oklahoma.[9]

IT IS SO ORDERED this ___ day of March, 1998.

/s/ Vicki Miles-LaGrange
VICKI MILES-LaGRANGE
UNITED STATES
DISTRICT JUDGE

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[9] In view of the Court's dismissal on these alternative grounds, the Court has not addressed ASHA's additional arguments that the plaintiff Tribes lack standing to sue and that plaintiffs' request for relief at para. 27(c) of their complaint is barred by the Oklahoma Housing Authorities Act.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SAC & FOX NATION OF OKLAHOMA; THE HOUSING AUTHORITY OF THE SAC & FOX NATION OF OKLAHOMA; CITIZEN POTAWATOMI NATION; CITIZEN POTAWATOMI NATION HOUSING AUTHORITY; KICKAPOO TRIBE OF OKLAHOMA; and HOUSING AUTHORITY OF THE KICKAPOO TRIBE OF OKLAHOMA,	)	Case No. CIV-97-0791-M
Plaintiffs,	)	
vs.	)	
ANDREW CUOMO as SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; DOM NESSI, as DEPUTY ASSISTANT SECRETARY for NATIVE AMERICAN PROGRAMS; WAYNE SIMS, ADMINISTRATOR of SOUTHERN PLAINS OFFICE OF NATIVE AMERICAN PROGRAMS; and THE HOUSING AUTHORITY OF THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendants.	)	

ORDER

(Filed May 28, 1998)

Plaintiffs' "Motion for Entry of Final Order," filed April 14, 1998, is DENIED for the reasons stated by defendants in their respective response briefs filed May 22, 1998.[1]

IT IS SO ORDERED THIS 28th day of May, 1998.

/s/ Vicki Miles-LaGrange
VICKI MILES-LaGRANGE
UNITED STATES
DISTRICT JUDGE

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[1] As stated by defendant Absentee Shawnee Housing Authority ("ASHA"): "It is clear from the language of the [March 24, 1998] order, the intent of this Court was [to] dismiss the plaintiffs' action." [ASHA's] Response to Plaintiffs' Motion for Entry of Final Order at 5 (May 22, 1998). As stated by the Federal Defendants: "[D]ismissal of the entire action, including the cause against the federal defendants, was properly accomplished by the court's order of March 24, 1998." Federal Defendants' Special Appearance and Response to Plaintiffs' Motion for Entry of Final Order at 4 (May 22, 1998).

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAC & FOX NATION OF OKLAHOMA; THE HOUSING AUTHORITY OF THE SAC & FOX NATION OF OKLAHOMA; CITIZEN POTAWATOMI NATION; CITIZEN POTAWATOMI NATION HOUSING AUTHORITY; KICKAPOO TRIBE OF OKLAHOMA; HOUSING AUTHORITY OF THE KICKAPOO TRIBE OF OKLAHOMA,	)	Nos. 97-6317 and 98-6212
Plaintiffs-Appellants,	)	
v.	)	
ANDREW CUOMO, as Secretary of the United States Department of Housing and Urban Development; DOM NESSI, as Deputy Assistant Secretary for Native American Programs; WAYNE SIMS, Administrator of Southern Plains Office of Native American Programs; THE HOUSING AUTHORITY OF THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendants-Appellees.	)	

ORDER

Filed December 9, 1999

Before **ANDERSON, McWILLIAMS** and **MURPHY,** Circuit Judges.

Appellants petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the en banc petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Opal A. Carter
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SAC AND FOX NATION OF OKLAHOMA; THE HOUSING AUTHORITY OF THE SAC AND FOX NATION OF OKLAHOMA; CITIZEN POTAWATOMI NATION; CITIZEN POTAWATOMI NATION HOUSING AUTHORITY; KICKAPOO TRIBE OF OKLAHOMA; AND HOUSING AUTHORITY OF THE KICKAPOO TRIBE OF OKLAHOMA,	)	
Plaintiffs,	)	Case No. CIV-97 791 M
vs.	)	
ANDREW CUOMO as SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; DOM NESSI, as DEPUTY ASSISTANT SECRETARY for NATIVE AMERICAN PROGRAMS; WAYNE SIMS, ADMINISTRATOR of SOUTHERN PLAINS OFFICE OF NATIVE AMERICAN PROGRAMS; and THE HOUSING AUTHORITY OF THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendants.	)	

COMPLAINT

(Filed May 13, 1997)

COMES NOW the Plaintiffs, Sac and Fox Nation of Oklahoma; The Housing Authority of the Sac and Fox Nation of Oklahoma, Citizen Potawatomi Nation, Citizen Potawatomi Nation Housing Authority, Kickapoo Tribe of Oklahoma and Housing Authority of the Kickapoo Tribe of Oklahoma, and for their cause of action against the Defendants, in and by their attorneys, in seeking both declaratory and injunctive relief allege and state as follows:

PARTIES

1. The Sac and Fox Nation is a federally recognized Indian Tribe located in the Western District of Oklahoma.

2. The Housing Authority of the Sac and Fox Nation is a tribal agency created pursuant to the Sac and Fox Housing Act of 1993. It is located in the Western District of Oklahoma.

3. The Citizen Potawatomi Nation (hereinafter "Potawatomi") is a federally recognized Indian Tribe located in the Western District.

4. The Citizen Potawatomi Nation Housing Authority (hereinafter "CPNHA") is an entity created by the Citizen Potawatomi Nation.

5. The Kickapoo Tribe of Oklahoma is a federally recognized Indian Tribe located in the Western District of Oklahoma.

6. The Housing Authority of the Kickapoo Tribe of Oklahoma (hereinafter "HAKT") is an entity created by the Kickapoo Tribe of Oklahoma.

7. Andrew Cuomo is the Secretary of the United States Department of Housing and Urban Development (hereinafter "HUD") which does business through the Southern Plains Office of Native American Programs of HUD located in Oklahoma City.

8. Dom Nessi is the Deputy Assistant Secretary for Native American Programs in Denver, Colorado.

9. Wayne Sims is the Administrator of the Southern Plains Office of Native American Programs located in Oklahoma City and former Executive Director of the Absentee Shawnee Housing Authority.

10. The Housing Authority of the Absentee Shawnee Tribe (hereinafter "ASHA") was created pursuant to the Oklahoma Housing Act (63 O.S. 1057) and is also located in the Western District. The Defendant, ASHA, is totally funded by HUD.

VENUE AND JURISDICTION

11. All the parties are located in the Western District. 28 U.S.C. 1391(e).

OPERATIVE FACTS

12. The operational/jurisdictional area of the Housing Authority of the Sac and Fox Nation is the boundaries of the original Sac and Fox Reservation in Oklahoma.

13. The operational/jurisdictional area of the CPNHA is the boundaries of the Potawatomi Reservation.

14. The operational/jurisdictional area of the KTHA is the former reservation boundaries of the Kickapoo Tribe of Oklahoma.

15. The Housing Authority Act (63 O.S. 1051, et seq.) determines the operational/jurisdictional area of an Indian housing authority created under Oklahoma law.

16. The operational area of an Indian housing authority created under state law is the area within the sponsoring tribe's former reservation boundaries. *See e.g., Cherokee Nation of Oklahoma v. Housing Authority of Seneca-Cayuga Tribe of Oklahoma,* No. C-78-422 (Ottawa Co. Dist. Ct. June 2, 1980) (findings of fact). A copy is attached as Exhibit A.

17. The tribal sponsor of the ASHA is the Absentee Shawnee Tribe of Oklahoma which has no former reservation in Oklahoma. *See Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier,* CIV-92-2161-R (W.D. Okla., May 22, 1996) (order and judgment). Thus, at best, the operational/jurisdictional area of the ASHA includes only land held by the United States in trust for the Absentee Shawnee Tribe of Oklahoma.

18. The ASHA has operated and continues to operate outside of its operational/jurisdictional area in the area or territory of the Plaintiffs and other tribes, including the Seminole Tribe.

19. Furthermore, the ASHA is planning to construct new projects outside of its operational/jurisdictional area

within the operational/jurisdictional area and territory of the Plaintiffs.

20. The Plaintiffs have not given the ASHA permission to operate in the Plaintiffs' area of operational/jurisdiction.

21. The ASHA has been advised by its own attorney that the ASHA has "no legal authority" to operate in other tribe's jurisdictions. *See* Exhibit B attached. As it has been advised by its own attorney, the ASHA's actions are illegal and are contrary to law.

22. The ASHA's encroachments on Plaintiffs' operational/jurisdictional areas have caused and will continue to cause threats to peace and to the civil rights of the housing residents unless enjoined by this court.

23. The ASHA's encroachments include illegally bringing actions in Absentee Shawnee Tribal court against non-Indians and non-tribal members for incidents on lands outside of the jurisdiction of the Absentee Shawnee Tribe of Oklahoma.

24. Every housing unit operated by the ASHA must be approved and funded by HUD.

25. Defendant Secretary of HUD and Defendant Southern Plaints Office of Native American Programs by and through Defendant Sims have been continually advised of the ASHA's illegal encroachments on other tribes' areas, but have refused to halt the encroachments, and if not enjoined, will continue to allow these encroachments and allocate federal funding to the ASHA based thereon.

24. [sic] Plaintiffs have no adequate remedy at law.

RELIEF

26. The Plaintiffs hereby request the District Court award them the following items of relief:

A) Render a temporary and permanent injunction against HUD and the Southern Plains Office of Native American Programs, from allocating funding and allowing the operation of the ASHA outside of ASHA's legal area of operation;

B) Render a temporary and permanent injunction prohibiting the ASHA from operating outside of its legal area of operation;

C) Enter an order that Defendants are to transfer all HUD projects in Plaintiffs' operational/jurisdictional area to Plaintiffs.

D) Enter a judgment of declaratory relief determining the rights and liabilities of all the parties; and

E) Award any other relief to the Plaintiffs it deems necessary and just.

BY: /s/ Nathan H. Young, III
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ATTORNEY FOR SAC AND FOX NATION OF OKLAHOMA, THE HOUSING AUTHORITY OF THE SAC AND FOX TRIBE OF OKLAHOMA; KICKAPOO TRIBE OF OKLAHOMA; and KICKAPOO TRIBE OF OKLAHOMA HOUSING AUTHORITY

BY: /s/ Michael Minnis
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PLAINTIFF'S EXHIBIT A

IN THE DISTRICT COURT IN AND FOR OTTAWA CO.
STATE OF OKLAHOMA

THE CHEROKEE NATION OF OKLAHOMA, and THE HOUSING AUTHORITY OF the CHEROKEE NATION OF OKLAHOMA,	)	
Plaintiffs,	)	NO. C-78-422
-vs-	)	
THE HOUSING AUTHORITY OF THE SENECA-CAYUGA TRIBE OF OKLAHOMA,	)	
Defendant.	)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND
JOURNAL ENTRY OF JUDGMENT

(Filed June 2, 1980)

This cause came on to be heard before the undersigned District Judge, pursuant to regular setting, on the 30th day of November, 1979. Plaintiffs, The Cherokee Nation of Oklahoma and The Housing Authority of the Cherokee Nation of Oklahoma, appearing by their attorney, Andrew Wilcoxen, and the defendant, The Housing Authority of the Seneca-Cayuga Tribe of Oklahoma, appearing by its attorney, J. R. Hall, Jr. Both sides having announced ready for trial, thereafter the parties did submit certain stipulations of fact which were transcribed and submitted to the Court as the facts necessary for the termination of this controversy, and the Court did order

the parties to submit trial briefs, suggested findings of fact and conclusions of law. All this having been done, and the Court being fully advised in the premises, and the cause being finally submitted, does make the following findings of fact, conclusions of law, and enters judgment thereon.

FINDINGS OF FACT

1. The Cherokee Nation of Oklahoma is a federally recognized Tribe of Indians, a body corporate and politic, exercising a limited sovereignty, with its principal place of business in Tahlequah, Cherokee County, Oklahoma;

The Seneca-Cayuga Tribe is a federally recognized Tribe of Indians, a body corporate and politic, exercising limited sovereignty, with its principal place of business in Miami, Ottawa County, Oklahoma;

2. Each of the aforesaid entities has organized a housing authority under the Oklahoma Housing Authorities Act, 63 O.S. §1051, et seq;

3. The Housing Authority of The Cherokee Nation of Oklahoma is an agency of The Cherokee Nation of Oklahoma and The Housing Authority of the Seneca-Cayuga Tribe of Oklahoma is an agency of the Seneca-Cayuga Tribe of Oklahoma;

4. The historic boundary of The Cherokee Nation of Oklahoma, as set out and described in the Cherokee Patent of 1838, includes all that portion of Ottawa County, Oklahoma lying Southwest of the Grand (Neosho) River;

5. The historic boundaries of the Seneca-Cayuga Tribe of Oklahoma do not include the lands lying Southwest of the Grand (Neosho) River in Ottawa County, Oklahoma;

6. Fairland is an incorporated community, located in Ottawa County, Oklahoma, Southwest of the Grand (Neosho) River;

7. The Housing Authority of The Cherokee Nation of Oklahoma has, for a number of years, been engaged in the construction of housing throughout the historic boundaries of The Cherokee Nation of Oklahoma; and

8. The Housing Authority of the Seneca-Cayuga Tribe of Oklahoma has been engaged in the Construction of housing at Fairland in Ottawa County, Oklahoma, within the historic boundaries of The Cherokee Nation of Oklahoma.

CONCLUSIONS OF LAW

1. Indian Tribes residing in Oklahoma may establish and operate housing authorities under the provisions of the Oklahoma Housing Authorities Act, 63 O. S. §1051, et seq;

2. Indian housing authorities are subject to the provisions of the laws that are applicable to other housing authorities created for cities and counties under the provisions of the Act;

3. The Oklahoma Housing Authorities Act restricts the operation of a housing authority of a city by prohibiting the operations of such an authority within the territorial boundaries of any other city unless specifically

authorized to so operate by proper resolution. As to counties, the housing authority of a county is prohibited from operating within the boundaries of any city without a resolution of need for its services by such city;

It is also provided within the Act that no authority may operate in any area where an authority already established is operating, except by consent of the operating authority. It is clear that all authorities are required to confine their activities to their operating areas absent request or invitation from some other authority;

4. Although no specific provision governs the operations of Indian housing authorities, the intent and purpose of the Legislature was to restrict the operations of Indian housing authorities, absent invitation from some other area, to the traditional historic or treaty boundaries of the Indian Nations; and

5. An Indian housing authority may not carry out projects beyond the traditionally recognized boundaries of that Indian Nation without a declaration of need and an invitation from a city or county or Indian Nation outside such boundaries, and no authority may operate in any area in which an authority already established is operating without the consent by resolution of the authority already operating therein.

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED that The Housing Authority of the Seneca-Cayuga Tribe of Oklahoma may continue to operate housing units, construct housing units and do other things authorized by

the Oklahoma Housing Authorities Act, 63 O. S. 1051, et seq, within that portion of Ottawa County, Oklahoma Southwest of the Grand (Neosho) River only with the consent and permission of The Housing Authority of The Cherokee Nation of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that The Housing Authority of The Cherokee Nation of Oklahoma may not operate or perform its construction activities within the boundaries of the Seneca-Cayuga Tribe of Oklahoma, and specifically Northeast of the Grand (Neosho) River in Ottawa County, Oklahoma, or any other place within the traditionally recognized treaty boundaries of the Seneca-Cayuga Tribe of Oklahoma without the consent of The Housing Authority of the Seneca-Cayuga Tribe of Oklahoma.

This Judgment is declaratory of the rights of the parties. The Seneca-Cayuga Authority may not construct housing units within that part of Ottawa County, Oklahoma lying Southwest of the Grand (Neosho) River without a resolution of consent from the Cherokee Authority. The Seneca-Cayoga Authority is enjoined and restrained from continuing to do so. To all of the foregoing the defendant, The Housing Authority of the Seneca-Cayuga Tribe of Oklahoma, is granted an exception.

DATED this 2 day of June, 1980.

/s/ Sam C. Fullerton
DISTRICT JUDGE

APPROVED:
/s/ Andrew Wilcoxen
Andrew Wilcoxen
Attorney for Plaintiffs

APPROVED AS TO FORM:
/s/ J. R. Hall, Jr.
J. R. Hall, Jr.
Attorney for Defendant

PLAINTIFF'S EXHIBIT B

HENRY A. WARE

Attorney at Law

[Phone Number And Address Omitted In Printing]

April 19, 1994

Marilyn Oxford, Executive Director
Housing Authority of the Absentee Shawnee
Tribe of Indians
P.O. Box 425
Shawnee, Oklahoma 74802-0425

RE: Legal Opinion – Jurisdiction of Absentee Shawnee Tribal Court over Absentee Shawnee Housing Authority MHO Homes located outside Territorial Limits

Last month, I was asked to research whether the Absentee Shawnee Tribal Court had jurisdiction to evict individual MHO participants, who reside outside the territorial reservation of the Absentee Shawnee tribe. In arriving at my opinion basic federal Indian law principles

were examined, federal treaties, and the Absentee Shawnee Tribal constitution and Code were reviewed were consulted, along with tribal court decisions on the subject.

ISSUE:

Can the Absentee Shawnee Housing Authority (ASHA) legally bring MHO participants into Absentee Shawnee District Court who are Kickapoo or some other tribe and whose homes are physically located within the original territorial limits of both the Sac and Fox and Kickapoo Nations for ejectment or forcible entry detainer?

ANSWER:

No, the Court rendering the judgment must have jurisdiction over the subject matter, the MHO home. Since the Absentee Shawnee Tribal court does not have in rem jurisdiction over lands located within the territorial jurisdiction of the Sac and Fox and Kickapoo Nations, any orders related to eviction or that seeks to effect title outside the territorial jurisdiction of the tribe would be void, thus unenforceable.

DISCUSSION:

In order to understand the importance of jurisdiction, a brief review of jurisdiction in the context of evictions is necessary. What follows are general principles and they are a guide for the way a court (tribal or state) would and should analyze a similar issue. While this paper is only associated with the authority of the Absentee Shawnee

tribal court to hear cases outside its territorial jurisdiction, the concept that administrative remedies must be exhausted prior to filing of eviction action must also be addressed in some way. Not only must the eviction case be filed in the proper court, but, the prerequisites to filing such eviction action must also be done to effectuate a valid judgment. A more detailed discussion of administrative exhaustion as it applies to HUD MHO Units is fully set out in Attachments #1-3.

If we assume then that the threshold requirements, namely, the exhaustion of administrative remedies have been met, then we can proceed with whether the eviction case has been filed in the proper tribal court.

FORCIBLE ENTRY AND DETAINER OR ACTIONS IN EJECTMENT

For a court to be able to give a legal decision it must possess jurisdiction over the matter and over the person(s) who appear before the court. Jurisdiction over the person is acquired several ways, i.e. by the person residing within the jurisdiction, by having domicile within the jurisdiction, by service while within the jurisdiction, or by appearing when notice is served. Personal jurisdiction can be waived, while subject matter jurisdiction can not. But for a court to have subject matter jurisdiction, it must be vested with it by law. In the matter at hand the subject matter is the real property, MHO Homes.

The decision for ejectment or forcible entry detainer concern specific property which is the subject matter of the case. Absentee Shawnee Tribe has available Forcible Entry and Detainer Code provisions which have been in

use up to this point. When a court has jurisdiction over certain property, this is called In rem jurisdiction. That is, where the subject matter is specific real property the court must have In rem jurisdiction over the property. For a court to have In rem jurisdiction, the property must physically be situated within the jurisdictional boundaries of the court. A decision in rem can only be rendered by a court with reference to property situated within its bounds.[1] Jurisdiction in rem is required where the decision sought is of a nature to directly affect real property.[2] A court of one state has no jurisdiction to establish[3], to pass[4] or to quiet title to real property situated in another state.[5] Or to make any other decision directly affecting real property located in another state, or the title to that real property.[6]

Ejectment is an action concerning title to real property thus the court with jurisdiction in rem must also hear the proceeding. The question as to what court or courts have jurisdiction of action of ejectment must be determined largely from constitutional and statutory provisions governing the jurisdiction of particular courts.

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[1] *Hanson v. Denekla*, 357 U.S. 235, *Sharp v. Sharp*, 65 OKLa 76, 166 P 175, *Moyer v. Koontz*, 79 NW 50.

[2] *McLaughlin v. McCory*, 18 SW 762, *Wimer v. Wimer*, 5 SE 536.

[3] *Olson v. Weber*, 187 NW 465, *Sharp v. Sharp*, 65 Okla 76, 166 p 175, *Croker v. Howland* 24 P2d 327.

[4] *Page v. McKee*, 3 bush (ky) 135.

[5] supra 2,3.

[6] *Overby v. Gordon*, 177 US 106, *Johnson v. Kimbro*, 3 head (tenn) 557, Supra 2&3.

The action of forcible entry and detainer is special statutory proceeding, summary in its nature and against common law. The statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding be coram non judice and void.[7] This action derives its authority wholly from statute, and in such proceeding, is therefore to be treated as a court of special and limited jurisdiction.[8] In the absence of a special statute to the contrary, the jurisdiction of the justice or other court entertaining an action of forcible entry and detainer is confined to determining the issue of peaceable possession of the land in dispute[9] and does not extend to an adjudication of the title or the right to ultimate possession. Under statutes providing, an action of forcible entry and detainer must be brought before the court in the district where the land in question is situated.[10] A statutory provision that justices of the peace "in their respective counties" shall have jurisdiction of actions of forcible entry and detainer gives them a jurisdiction coextensive with the area of their respective counties.[11]

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[7] *Shuman v. Brown*, 180 Okla 130, 109 P2d 597.

[8] Id.

[9] *Dodd v. Scott*, 46 NW 1057, *Page v. Dwight*, 48 NE 850.

[10] *Tietjen v. McCoy*, 24 NM 164, 172 P 1144.

[11] *Raynolds v. Larkin*, 10 Colo 126, 172 p 114.

ABSTENTEE SHAWNEE TRIBAL COURT JURISDICTION

Generally, tribal courts have exclusive jurisdiction over reservation affairs and activities of its tribal members, within Indian Country. *See generally, Williams v. Lee,* 358 U.S. 217 (1959); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978); *Ahboah v. Housing Authority of Kiowa Tribe,* 660 P2d 625 (1984); *Harjo v. Housing Authority of Seminole Nation,* 790 P2d1098 (1990). The only specific limitations to civil jurisdiction are such legal authority found in federal law, treaty law and those of the tribe itself. The first step or task then in any Indian law analysis is to make a determination whether such activity occurs in Indian country. Since under our scenario the MHO Units are not located on reservation lands, nor can they be considered lands held in trust, the property must fit the legal definition of dependent Indian community. See 18 U.S.C. Section 1151(b). If it does not meet the definition of Indian country, then county courts are the proper forum for evictions and not tribal courts. Compare *Lewis v. Sac & Fox Housing Authority* and *Harjo.* While the analysis in each case do reconcile with each other, one thing appears to be perfectly clear, there will be no more 'dependent Indian community' case holdings, if the Oklahoma Supreme Court has anything to do with it. If we assume that the property in question is a dependent Indian community, then the more difficult issues arises regarding the [tribal] forum to be used.

The Absentee Shawnee Tribe without a question has jurisdiction over all Shawnee allotments and reservation lands of the tribe, since they all must necessarily lie within the original reservation boundaries of the tribe. It

is also clear that up to this date the Absentee Shawnee Tribe is exercising jurisdiction over eviction actions, where dependent Indian communities are involved, within its original jurisdictional boundaries. Whether the tribal court will continue to exercise exclusive jurisdiction or have concurrent jurisdiction with the Potawatomi Tribe over such property may be answered by the *Citizen Band Potawatomi Indian Tribe v. L.W. Collier* (D.C. No. CIV-92-2161-R), currently pending before the United States District Court. The Absentee Shawnee Tribe has adopted a very comprehensive code and that in turn is based on a very precise governing document, the absentee Shawnee Constitution. Evictions actions are authorized by tribal ordinance. These Absentee Shawnee tribal documents must be construed in the first instance for their interpretation, to see if such extra-territorial jurisdiction is allowed.

The Absentee Shawnee Constitution states at Article II Section:

> 1. "The jurisdiction and governmental powers of the Absentee-Shawnee Tribe of Indians of Oklahoma shall, consistent with applicable federal law, extend to all persons and to all real and personal property, including lands and natural resources, and to all waters and air space within the Indian Country, as defined in 18 U.S.C. Section 1151 or its successor, *over which the Absentee-Shawnee Tribe of Indians of Oklahoma has authority within the boundary of the tribal jurisdiction established by Agreement dated June 26, 1890* and ratified by the act of March 3, 1891 (26 Stat. 1019), and such other land or interest in land, which may be subsequently acquired."

Absentee Shawnee Const. Art. II, § ___ [Emphasis added.]

Another provision, Article II, Section 2, in the Absentee Shawnee Constitution must be construed:

> "The jurisdiction and governmental powers of the Absentee-Shawnee Tribe of Indians of Oklahoma Shall also, *consistent with the applicable Federal law,* extend outside the exterior boundaries of the Absentee-Shawnee Tribe of Indians of Oklahoma." [Emphasis added].

Absentee Shawnee Const. Art. II, § 2 [Emphasis added.]

The constitution makes it clear that the tribal jurisdiction could include all those lands which are Indian country pursuant to 18 U.S.C. Section 1151 and are within the tribal territorial limits as set out by the Agreement of June 26, 1890. The agreement sets the northern most limits of tribal territory as the North Canadian River. The remaining language in Section 2, would appear to allow tribal jurisdiction, where consistent with federal law. The question that arises is whether absentee Shawnee Housing Authority MHO Units located outside the territorial jurisdiction are meant to be covered by Article II, Section 2, as mentioned above, thereby coming within the jurisdiction of the absentee Shawnee Court. While at first blush the provision would seem to operate to give the Absentee Shawnee Tribe some authority over property irrespective of the interests of Kickapoo or Sac and Fox Tribal interests, outside the reservation, however, such construction would not be consistent with federal law ad modern notions of sovereignty.

The Absentee Shawnee Tribal Court ruled in *Absentee Shawnee Tribe v. Bear,* CRM-91-29, that it had criminal jurisdiction over a non-tribal member, who lived in an Absentee Shawnee Housing Authority MHO Unit, located within the territorial jurisdiction of the Sac and Fox Nation. The trial court ruled that it had concurrent jurisdiction with the Sac and Fox Nation over the criminal acts of the non-tribal member due to defendant's contacts with the Absentee Shawnee Tribe, because the MHO Unit was owned by the Housing Authority, an agency of the Absentee Shawnee Tribe and the trial court's construction of the above constitutional provisions. While the Bear case is the law, in the area of criminal jurisdiction, it is doubtful that such case law would stand if the case were appealed.

One fallacy in the Bear decision, is that the decision was not based ultimately, on the interpretation of the Absentee Shawnee tribal constitution. The Court mentioned the constitution but specifically stated the constitution need not be construed, and only looked to the tribal code for guidance and to prudential rules of concurrent jurisdiction. The Bear case did not involve a situation where title to land was at issue. As we have earlier discussed, when lands are at issue we must look to its location among other things for jurisdictional authority.

In addition, the Bear case is not supported by federal policies. See Attachments 4-6. The reason being, the Sac and Fox and the Kickapoo Nations both like the Absentee Shawnee Tribe of Indians has [sic] exercised both civil and criminal jurisdiction over all Indians within their jurisdictional boundaries. The Sac and Fox Nation, like the Absentee Shawnee, has assumed this legal authority

to the extent of their treaty. See Treaty of February 18, 1867. If the plain language of the federal law, by virtue of tribe's federal agreements or federal treaties do not vest territorial jurisdiction in the Absentee Shawnee Tribe, then it would necessarily serve as a limitation on tribal authority, where another Indian Nation is assuming that same legal authority.

Based on the legal nature of eviction actions and its definite requirements of exclusive jurisdiction, it would appear that there is no room for sharing of jurisdiction. The analysis of the Bear decision would not apply to the case at hand. When property is located within the jurisdiction of another Nation and that tribe is exercising a full gamit [sic] of regulatory authority, then it makes little sense to allow concurrent legal authority.

CONCLUSION

What this means to the Housing Authority is that the Absentee Shawnee District Court has no legal authority to effectuate any judgment over real property outside its territorial jurisdiction. This court cannot render decisions on ejectment and forcible entry and detainer in the MHO home in question [sic] is outside Absentee Shawnee land. The Housing Authority must bring these types of suits in the court that has in rem jurisdiction, even if it means bringing the eviction action if [sic] another tribal court. For those MHO Units located on lands within the Kickapoo territorial jurisdiction, such eviction actions must be brought in Kickapoo Tribal Court. For those MHO Units located in Sac and Fox Nation, they too must be brought in the Sac and Fox District Courts.

All three (3) tribes (Kickapoo, Sac & Fox, Absentee Shawnee) have eviction codes that are almost identical and HUD contracts (MHO Agreement) and federal HUD Policies and Procedures must be followed regardless where the eviction action is mainained [sic]. There are no real advantages for seeking one forum as to the others. As mentioned earlier, however, valid eviction [sic] are what we must seek, if indeed evictions are necessary. It only means that the Kickapoo Courts are the proper place for these eviction suits when the MHO home is on Kickapoo land and the same rule applies for those properties located in Sac & Fox Indian Country. Law enforcement for the eviction after judgement is also vested with the jurisdiction where the real property lies. Thus in this case the Kickapoo Tribal police would enforce a Writ of Assistance or the judgement made by its tribal court.

Sincerely,

/s/ Henry A. Ware
Henry A. Ware
Attorney at Law

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SAC AND FOX NATION OF OKLAHOMA; et al.	)	
Plaintiffs,	)	Case No. CIV-97-791-M
vs.	)	
ANDREW CUOMO, et al.	)	
Defendants.	)	

CORRECTIONS TO COMPLAINT

(Filed May 14, 1997)

The "Complaint" filed herein on May 13, 1997, contains an omission and two typographical errors. On page 3, plaintiffs omitted by mistake a sentence in paragraph 11. The omitted sentence is: "Jurisdiction is based upon 28 U.S.C. 1331 and 28 U.S.C. 1362." On page 5, the second paragraph numbered "24" should be paragraph "26" and paragraph "26" should be paragraph "27." The complaint is corrected accordingly.

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THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LOCAL COURT RULES

Effective: May 1, 1998

* * *

LCvR7.1 Motion Practice.

* * *

(l) **Notice to the Court of Matters Under Advisement for More Than Ninety (90) Days.** In the event any matter, including but not limited to, a motion or decision in a bench trial has been under advisement or submitted for decision for a period of more than ninety (90) days, each party affected by the undecided matter shall send to the judge a letter particularly describing the matter under advisement and stating the date the matter was taken under advisement.

* * *

APPEAL REFER
JE

U.S. District Court
Western District of Oklahoma (Oklahoma Cty)

CIVIL DOCKET FOR CASE #: 97-CV-791)

Filed: 05/13/97

Sac & Fox Nation, et al v. Cuomo, et al
Assigned to: Honorable Vicki Miles-LaGrange
Referred to: Magistrate Judge Pat Irwin
Demand: $0,000 Nature of Suit: 890
Lead Docket: None Jurisdiction: US Defendant

Dkt# in other court: None

Cause: 28:1362 Indian Tribal Controversy

SAC & FOX NATION, of Oklahoma
plaintiff

SAC AND FOX NATION OF OKLAHOMA HOUSING AUTHORITY
plaintiff

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CITIZEN POTAWATOMI NATION plaintiff	Nathan H Young, III (See above) [COR LD NTC]
CITIZEN POTAWATOMI NATION HOUSING AUTHORITY plaintiff	Nathan H Young, III (See above) [COR LD NTC]
KICKAPOO TRIBE OF OKLAHOMA plaintiff	Nathan H Young, III (See above) [COR LD NTC]
KICKAPOO TRIBE OF OKLAHOMA HOUSING AUTHORITY plaintiff	Nathan H Young, III (See above) [COR LD NTC]
v.	
ANDREW CUOMO, as Secretary of the United States Department of Housing and Urban Development defendant	Arvo Q Mikkanen FAX-553-8888 [COR LD NTC] US Attorney's Office 210 W Park Ave Suite 400 Oklahoma City, OK 73102 405-553-8700
DOM NESSI, Deputy Secretary for Native American Programs defendant	
WAYNE SIMS, Administrator of Southern Plains Office of Native American Programs defendant	

ABSENTEE SHAWNEE TRIBE OF OKLAHOMA HOUSING AUTHORITY defendant	Dena LaMoyne Silliman FAX-329-3894 [COR LD NTC] F Browning Pipestem FAX-329-3894 [COR LD NTC] F Browning Pipestem & Associates 111 N Peters Suite 200 Norman, OK 73135 405-329-3840

5/13/97	1	COMPLAINT (mb) [Entry date 05/14/97]
5/13/97	–	RECEIPT FOR MONEY RECEIVED in the amount of $ 150.00 by Attorney Michael Minnis & Assoc, receipt # 057603 (mb) [Entry date 05/14/97]
5/13/97	2	PRAECIPE for and issued 4 summons by plaintiff (fp) [Entry date 05/14/97]
5/13/97	3	MOTION by plaintiff for preliminary injunction purs to FRCP 65 (fp) [Entry date 05/14/97]
5/13/97	4	MEMORANDUM/BRIEF by plaintiff in support of motion for preliminary injunction purs to FRCP 65 [3-1] (fp) [Entry date 05/14/97]
5/14/97	5	NOTICE by plaintiff of Corrections to Complaint (fp) [Entry date 05/15/97]
5/14/97	6	MOTION by plaintiffs' for hearing on preliminary injunctions and supporting brief (fp) [Entry date 05/15/97]

5/15/97	7	RETURN OF SERVICE executed on Wayne Sims, Administrator Southern Plains Ofc of native American Programs, signed by Greg Young on 5/14/97 (60 days) (fp) [Entry date 05/16/97]
5/16/97	8	RETURN OF SERVICE executed upon defendant Absentee Trb Housing on 5/15/97 cert mail signed Zack Morris (20 days) (fp)
5/19/97	9	ORDER by Honorable Robin J. Cauthron for Honorable Vicki Miles LaGrange granting pla's motion for hearing on preliminary injunctions [6-1]; hrg is sched for 5/29/97 at 1:30 p.m.; Pla shall hand deliver a copy of this Order to dfts w/in 3 days of the date of this order. Dfts shall fil their resp on or before 12:00 noon on 5/27/97 (cc: all counsel) (cs2)
5/20/97	10	RETURN OF SERVICE executed upon defendant Dom Nessi on 5/15/97 by cert mail (ch2) [Entry date 05/21/97]
5/20/97	11	CERTIFICATE OF SERVICE by plaintiff Order of 5/19/97 granting plf's app for prelim inj (ch2) [Entry date 05/21/97]
5/20/97	12	CERTIFICATE OF SERVICE by plaintiff re 5/19/97 Order granting plf's app for prelim inj to USA Mikkanen, Wayne Sims by plf's atty Michael McMahan (ch2) [Entry date 05/21/97]

5/23/97	13	SPECIAL APPEARANCE AND MOTION by Federal Defendant for Referral of Case to Settlement Judge, and for Ext of Time to File response to Plfs' Mtn for a Preliminary Injunction, and to Continue Hrg on Plfs' Mtn for a Preliminary Injunction (fp)
5/23/97	14	RETURN OF SERVICE executed upon defendant Andrew Cuomo on 5/19/97 cert mail signed (illegible) (60 days) (fp)
5/27/97	15	MOTION by defendant Absentee Trb Housing for extension of time to file response to pfs' Mtn for a Preliminary Injunction and to continue hrg on Plfs' Mtn for Preliminary Injunction (fp)
5/27/97	16	OBJECTIONS by plaintiff to motion for Ext of Time to File response to Plfs' Mtn for a Preliminary Injunction and to Continue Hearing on Preliminary Injunction [13-2] (fp)
5/27/97	17	ORDER by Honorable Robin J. Cauthron granting motion for Referral of Case to Settlement Judge [13-1], granting motion for Ext of Time to File response to Plfs' Mtn for a Preliminary Injunction [13-2], granting motion to Continue Hrg on Plfs' Mtn for a Preliminary Injunction. The hrg currently set for May 29, 1997, on Prelin Injunc is stricken to be reset by the ct on a date after June 26, 1997. [13-3] Case referred to Magistrate Judge Pat Irwin (cc: all counsel) (fp) [Entry date 05/28/97]

5/27/97	18	ORDER by Honorable Robin J. Cauthron granting motion for extension of time to file response to pfs' Mtn for a Preliminary Injunction and to continue hrg on Plfs' Mtn for Preliminary Injunction [15-1] The hrg on plfs' mtn for a preliminary injunction currently set for May 29 1997 is stricken to be reset by the Ct on a date after June 26, 1997 (cc: all counsel) (fp) [Entry date 05/28/97]
5/28/97	19	OBJECTIONS/OPPOSITION by plaintiffs' to Absentee Shawnee Housing Authority's Request For Enlargement of Time And Continuance of Hearing [15-1] (fp) [Entry date 05/29/97]
6/4/97	20	MOTION by defendant Absentee Trb Housing to dismiss plf's cmp (fp) [Entry date 06/05/97] [Edit date 06/24/97]
6/4/97	21	MEMORANDUM/BRIEF by defendant Absentee Trb Housing in support of motion to dismiss pfl's cmp [20-1] (fp) [Entry date 06/05/97]
6/9/97	22	ORDER by Honorable Vicki Miles-LaGrange; Settlement conf Monday, June 23, 1997, at 8:30 bf Honorable Pat Irwin (cc: all counsel) (fp) [Entry date 06/10/97]
6/9/97	23	LETTER from defendant Absentee Trb Housing with attached Table of Authorities which was inadvertently omitted fm the Brief. (fp) [Entry date 06/10/97]

6/13/97	24	ORDER by Honorable Vicki Miles-LaGrange; Settlement conf Monday, June 23, 1997 at 8:30 a.m. bf Honorable Pat Irwin (cc: all counsel) (fp) [Entry date 06/16/97]
6/23/97	25	MOTION by defendant Absentee Trb Housing to file Response to Plfs' Motion for a Preliminary Injunction (fp) [Entry date 06/24/97]
6/23/97	26	MEMORANDUM BRIEF by plaintiff in opposition to dft's motion to dismiss plf's cmp [20-1] (fp) [Entry date 06/24/97]
6/23/97	27	OBJECTIONS/OPPOSITION by plaintiff to dft's motion to file Response to Plfs' Motion for a Preliminary Injunction [25-1] (fp) [Entry date 06/24/97]
6/24/97	28	ORDER by Honorable Vicki Miles-LaGrange granting motion for extention [sic] of time until July 3, 1997, to file Response to Plfs' Motion for a Preliminary Injunction [25-1] (cc: all counsel) (fp) [Entry date 06/25/97]
6/26/97	29	ATTORNEY APPEARANCE for defendant Andrew Cuomo by Arvo Q Mikkanen (fp) [Entry date 06/27/97]
6/27/97	30	SPEICIAL [sic] APPR AND FEDERAL DFTS' RESPONSE by defendant Andrew Cuomo to plaintiffs' motion for preliminary injunction purs to FRCP 65 [3-1] (fp)

7/3/97	31	RESPONSE by defendant Absentee Trb Housing to motion for preliminary injunction purs to FRCP 65 [3-1] (cs2) [Entry date 07/07/97]
7/7/97	32	MINUTE ORDER by Honorable Vicki Miles-LaGrange re dft mtn to dism [20-1] Pending resolution of mtn to dismiss, all further proceedings in case are stayed (cc: all counsel) (cs2) [Entry date 07/08/97]
7/7/97	33	ORDER by Honorable Vicki Miles-LaGrange denying pla's motion for preliminary injunction purs to FRCP 65 [3-1] After considering the ptys brfs and evidentiary submissions, the Court finds and concl pla's have failed to demonstrate that the four factors listed weigh heavily and compellingly in their favor as req under the heightened standard adopted by the Tenth Circuit. Accordingly, pla's mtn is denied (cc: all counsel) (cs2) [Entry date 07/08/97]
7/14/97	34	MOTION by plaintiff to alter or amend order and supporting brief (fp) [Entry date 07/15/97]
7/14/97	35	MOTION by plaintiff to lift Minute Order staying further proceedings and supporting brief (fp) [Entry date 07/15/97]
7/15/97	36	CORRECTED MOTION by plaintiff to Lift "Minute Order Staying Further Proceedings" and Supporting Brief (fp) [Entry date 07/16/97]

7/15/97	37	CORRECTION and SUPPLEMENT by plaintiff to Plaintiffs' Mtn Filed July 14, 1997 (fp) [Entry date 07/16/97]
8/20/97	38	ORDER by Honorable Vicki Miles-LaGrange granting motion to Lift STAY such that the stay is lifted for the limited purpose of considering the recusal issue. Accordingly, plfs are grtd lv to file their mtn for recusal by August 25, 1997, and dfts shl file their response to the mtn by Sept 15, 1997. the stay remains in effect for all other purposes. Fur, as req by plfs, their July 14, 1997 mtn to alter or amend judgment [doc #34] and their July 14, 1997 mtn to list stay [doc #35] are withdrawn [36-1] (cc: all counsel) (fp)
8/22/97	39	MOTION by plaintiffs' for order for disqualification and supporting brief (fp)
9/4/97	40	ENTER ORDER by Honorable Vicki Miles-LaGrange Settlement conf was held in this cs on June 23 (cc: all counsel) (fp) [Entry date 09/05/97]
9/4/97	41	NOTICE OF APPEAL by all plaintiff Sac & Fox Nation, plaintiff Sac & Fox Housing, plaintiff Cit Potawatomi Ntn, plaintiff Citizen Pot Housing, plaintiff Kickapoo Tribe of OK, plaintiff Kickapoo Trb Housing from Dist. Court decision [33-1] transcript order set for 9/19/97 (mb) [Entry date 09/09/97]
9/4/97	–	RECEIVED re appeal [41-1] fee in amount of $ 105.00 (Receipt # 059490) (mb) [Entry date 09/09/97]

9/10/97	42	CLERK'S LETTER re: service of Notice of Appeal, with copy of letter, Notice of Appeal and docket sheet as preliminary record mailed to CCA and counsel (mb)
9/15/97	43	RESPONSE by defendant Absentee Trb Housing to motion for order for disqualification [39-1] (fp)
9/16/97	44	RESPONSE IN OPPOSITION by Federal Defendants' and Special appearance to Plfs' Mtn for disqualification and brief in support [39-1] (fp) [Entry date 09/17/97]
9/16/97	45	NOTICE of Transcript Order Form by plaintiff Sac & Fox Nation that transcripts are not necessary; transcript order satisfied 9/16/97 (mb) [Entry date 09/17/97]
9/17/97	46	CLERK'S letter to CCA and counsel advising that no transcripts are necessary. (mb)
9/19/97	47	ORDER by Honorable Vicki Miles-LaGrange denying plf's motion for order for disqualification [39-1] (cc: all counsel) (fp) [Edit date 10/10/97]
9/22/97	–	APPELLATE Docket Number 97-6317 (mb) [Entry date 09/23/97]
3/24/98	48	ORDER by Honorable Vicki Miles-LaGrange granting motion to dismiss plf's cmp [20-1] dismissing case (cc: all counsel) (fp) [Entry date 03/30/98]

4/13/98	50	Order from CCA: The petition for writ of prohibition and/or mandamus is denied as moot. Petitioners request to file a reply to respondents brief is denied re appeal [41-1] (Porfilio, Kelly,) (mb) [Entry date 04/20/98]
4/14/98	49	MOTION by Plf for Entry of Final Order and Supporting Brief (fp)
4/30/98	51	MINUTE ORDER by Honorable Vicki Miles-LaGrange; On April 29, 1998, the Ct received a ltr concerning this cs, fm one of the attorneys representing the plfs. the Ct cannot give the ltr any consideration. Any such ltrs although placed in the Ct clerk's file, cannot be considered by the Ct in its handling of this litigation. the Ct will consider only papers that are properly filed or delivered in accordance with the applicable federal and local rules. A cpy of the ltr is attached as Exh "A" (cc: all counsel) (fp)
5/6/98	52	MINUTE ORDER by Honorable Vicki Miles-LaGrange re plf's "Mtn for entry of Final Order" [49-1] Dfts are directed to file a response to plfs' by May 22, 1998 (cc: all counsel) (fp)
5/7/98	53	NOTICE OF APPEAL by plaintiff Sac & Fox Nation, plaintiff Sac & Fox Housing, plaintiff Cit Potawatomi Ntn, plaintiff Citizen Pot Housing, plaintiff Kickapoo Tribe of OK, plaintiff Kickapoo Trb Housing from Dist. Court decision transcript order set for 5/22/98 [48-2] (mb) [Entry date 05/12/98]

5/7/98	–	RECEIVED re appeal [53-1] fee in amount of $ 105.00 (Receipt # 063497) (mb) [Entry date 05/12/98]
5/12/98	54	CLERK'S LETTER re: service of Notice of Appeal, with copy of letter, Notice of Appeal and docket sheet as preliminary record mailed to CCA and counsel (mb)
5/15/98	55	APPELLATE Docket Number 98-6212 (mb) [Entry date 05/18/98]
5/15/98	56	NOTICE of Transcript Order Form by plaintiff Sac & Fox Nation, plaintiff Sac & Fox Housing, plaintiff Cit Potawatomi Ntn, plaintiff Citizen Pot Housing, plaintiff Kickapoo Tribe of OK, plaintiff Kickapoo Trb Housing that transcripts are not necessary; Dates Ordered : transcript order satisfied5/15/98 (mb) [Entry date 05/18/98]
5/18/98	57	CLERK'S letter to CCA and counsel advising no transcripts are necessary. (mb)
5/22/98	58	RESPONSE and supporting brief by defendant Andrew Cuomo, defendant Dom Nessi, defendant Wayne Sims, defendant Absentee Trb Housing to motion by Plf for Entry of Final Order [49-1] (cs2) [Entry date 05/26/98]
5/22/98	59	RESPONSE and supporting brief by defendant Absentee Trb Housing to pla's motion by Plf for Entry of Final Order [49-1] (cs2) [Entry date 05/26/98]

5/28/98	60	ORDER by Honorable Vicki Miles-LaGrange denying motion by Plf for Entry of Final Order for the reasons stated by dfts in their respective response brfs filed May 22, 1998 [49-1] (cc: all counsel) (fp)
1/4/00	61	MANDATE from Circuit Court of Appeals affirming the dismissal of the complaint for lack of federal question jurisdiction, dismissing as moot the appeal from the order denying a preliminary injunction, affirming th edenial of the motion to disqualify, and vacating the district court's dismissal for failure to join an indispensable party. [53-1], [41-1] (Anderson, McWilliams, Murphy) (sn)

Supreme Court, U.S.
FILED
MAY 02 2000
CLERK

No. 99-1486

In The

Supreme Court of the United States

SAC AND FOX NATION OF OKLAHOMA, et al.,

Petitioners,

v.

ANDREW CUOMO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT ABSENTEE SHAWNEE HOUSING AUTHORITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Three Tribes' properly invoked the federal question jurisdiction of the federal district court by presenting a claim that must be decided pursuant to state law?

2. Whether the assigned district judge abused her discretion by refusing to recuse hereself where no justification existed for the requested recusal?

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RESPONDENT ABSENTEE SHAWNEE HOUSING AUTHORITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners, three Indian tribes and their respective housing authorities (hereinafter "Petitioners" or "Three Tribes"), are seeking review of a decision by the Tenth Circuit Court of Appeals affirming the dismissal of their complaint for lack of federal question jurisdiction and the denial of the motion to disqualify. In their effort to explain away the glaring deficiencies on the face of their initial and subsequently corrected complaint, Petitioners, now in their final appellate effort, attempt to extrapolate their supposed claim into one that they contend could possibly be construed as a federal question. Further, as a direct result of the adverse decisions made by the District Judge in this matter, Petitioners feebly attempt to show some bias and partiality that they believe that the Judge harbors against them. Petitioners fail in both efforts as there is no federal question jurisdictional basis for their complaint and the District Judge's decisions in this matter were legally grounded and exhibit no bias or partiality to either side of the controversy.

On May 13, 1997, Petitioners filed their complaint seeking declaratory and injunctive relief without stating and invoking a proper jurisdictional basis. Petitioners further requested a preliminary injunction, extraordinary relief, in order to mandate a change in the status quo and halt the lawful business of the Absentee Shawnee Housing Authority (hereinafter "ASHA"), an entity established

pursuant to the Oklahoma Housing Authorities Act, 63 O.S. §§ 1051 et seq.[1] ASHA filed a timely and proper Motion to Dismiss on June 4, 1997, based in part on lack of federal question jurisdiction. It is unequivocal that through these actions the Three Tribes sought to destroy the ASHA by effectively stealing and taking for their own the existing housing stock built and developed by the ASHA over the past 32 years and to deny the ASHA any

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[1] Specifically, 63 O.S. § 1057 states as follows:

> There is hereby created, with respect to each Indian tribe, band, or nation in the state, a public body corporate and politic, to function in the operating area of such Indian tribe, band, or nation to be known as the "housing authority" of said Indian tribe, band, or nation, which shall be an agency of the State of Oklahoma, possessing all powers, rights, and functions herein specified for city and county housing authorities created pursuant to this act: Provided that said Indian housing authority shall not transact any business nor exercise its powers hereunder until or unless the governing council of said tribe, band, or nation, as the case may be, by proper resolution, declares that there is a need for an authority to function for said tribe, band, or nation.
>
> Except as otherwise provided in this act, all the provisions of law applicable to housing authorities created for cities and counties and the commissioners of such authorities shall be applicable to Indian housing authorities and the commissioners thereof, unless a different meaning clearly appears from the context. The Chief or other governing head of an Indian tribe, band, or nation is hereby authorized to exercise all appointing and other powers with respect to an Indian housing authority that are vested by this act in the mayor of a city relating to a city housing authority.

area of future operation. The Three Tribes wholly failed to demonstrate a proper legal or jurisdictional basis for this extraordinary request and the requested injunctive relief was properly denied by the District Court on July 7, 1997. Doc No. 33. All further proceedings in this matter were stayed by the District Court until the resolution of ASHA's pending Motion to Dismiss.

Over one hundred days later, on August 22, 1997, in an obvious response to adverse rulings and in an attempt to "judge shop", the Three Tribes sought the recusal of the presiding Judge, [Doc 39] and subsequently sought an appeal on the denial of the request for a preliminary injunction. [Doc 41] The Three Tribes also requested an expedited appeal and an injunction pending appeal. The presiding Judge overruled the Three Tribes' Request for Disqualification, Petitioners' App. 19, and the Tenth Circuit Court of Appeals rejected the Three Tribes' request to expedite the appeal and for an injunction pending an appeal. Petitioners' App. 6.

On March 24, 1998, the District Court properly dismissed the Three Tribes' complaint[2] for "lack of federal question jurisdiction or, in the alternative, for failure to join an indispensable party, the Absentee Shawnee Tribe of Oklahoma." Petitioners' App. 21. After attempting to obtain a second order of dismissal from the District Court, the Three Tribes' appealed the dismissal Order to the Tenth Circuit Court of Appeals. The Tenth Circuit

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[2] Although the District Court stated the dismissal in terms of the "Complaint" it is patently clear that the Court intended a dismissal of all claims and/or actions. *M.M. v. Zavaras*, 139 F.3d 798 (10th Cir. 1998).

Court of Appeals affirmed the dismissal and the denial of the motion to disqualify.

The Three Tribes, without jurisdictional authority, seek to dramatically alter the status quo that has been in place and approved by the Department of Housing and Urban Development (hereinafter "HUD") for more than 32 years and to somehow convince this honorable Court, without proper statutory or other authority, that such an unprecedented action is warranted and equitable. In response, the ASHA, an entity created pursuant to state statute, i.e., 63 O.S. §§ 1051 et seq., asserts that such actions cannot be sanctioned by this Court because (1) federal court subject matter jurisdiction is entirely lacking from an examination of the face of the Three Tribes' Complaint and same has been successfully challenged by the ASHA; (2) the ASHA is an entity created by state statute and any question regarding its existence and/or operations would arise under state, not federal, law; and (3) the Three Tribes have totally failed to identify any bias or partiality of the presiding District Judge. Therefore, the Three Tribes' Petition for Writ of Certiorari must be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

A petition for writ of certiorari is granted only for "compelling reasons."[3] Because the Three Tribes have not

[3] Sup. Ct. Rule 10 states as follows:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. *A petition for a writ of certiorari will be granted*

articulated any compelling reason for granting certiorari, the petition should be denied. In the first instance, the lack of federal question jurisdiction is apparent from the face of their complaint. Secondly, the Three Tribes have failed to establish lack of impartiality requiring disqualification of the presiding District Judge. These arguments will be discussed in order.

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only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

I. THE WRIT MUST BE DENIED BECAUSE THE MATTER IN CONTROVERSY DOES NOT ARISE UNDER THE CONSTITUTION OR ANY LAW OR TREATY OF THE UNITED STATES

In order for a federal court to exercise subject matter jurisdiction over a claim, the plaintiff's complaint must contain a plain statement of the basis for jurisdiction. Fed. R. Civ. P. 8(a)(1) (1987). In the Complaint, Petitioners contend that jurisdiction is proper under 28 U.S.C. §§ 1331 and 1362, without pleading a factual basis for federal question jurisdiction. 28 U.S.C. § 1331 states as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

In deciding whether this or any other case arises under federal law, federal courts are guided generally by the "well-pleaded complaint" rule, under which a suit arises under federal law "only when the plaintiff's statement of his own cause of action shows that it is based" on federal law. *Schmeling v. NORDAM*, 97 F.3d 1336 (10th Cir. 1996) *citing Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). *See also Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63 (1987) ("It is long settled law that a cause of action arises under federal law only when the Plaintiff's well-pleaded complaint raises issues of federal law.") For purposes of § 1331, it has been determined by this honorable Court that a case "arises under" federal law only when "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v.*

Construction Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983). To bring a case within the purview of the requirements of § 1331, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Western Shoshone Business Council for and on Behalf of Western Shoshone Tribe of Duck Valley Reservation v. Babbit*, 1 F.3d 1052, 1058 (10th Cir. 1993).

In the present case, the complaint and its "correction" relied upon by the Three Tribes merely cite the federal question statutes, 28 U.S.C. §§ 1331 and 1362, and makes no legitimate attempt to demonstrate that the controversy arises under the Constitution, laws or treaties of the United States. Therefore, the Three Tribes fail to satisfy the elementary requirements of the "well-pleaded complaint" rule.[4]

On the face of the complaint, the Three Tribes allege that the ASHA is operating outside of its operational/jurisdictional area as defined by state law and within the operational/jurisdictional area of the Three Tribes. The law at issue in the complaint, if any, is the Oklahoma Housing Authorities Act, 63 O.S. §§ 1051 et seq. – the law that "determines the operational/jurisdictional area of an Indian housing authority created under Oklahoma law."

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[4] The questions presented by the Three Tribes in their Petition for Writ of Certiorari indicate their displeasure in being unable to obtain a hearing on their original complaint. However, the complaint must first properly invoke federal jurisdiction before any hearing becomes a possibility.

Petitioners' App. at 44, ¶ 15.[5] The Three Tribes fail to plead any constitutional provision, federal law or treaty upon which federal question jurisdiction could rest. A close analysis of the face of the complaint[6] reveals that the only law in question is 63 O.S. §§ 1051 et seq. – an Oklahoma state law that requires no federal court interpretation for enforcement. In fact, there is no hint of any federal question contained in the Plaintiffs' Complaint to substantiate subject matter jurisdiction.[7]

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[5] Plaintiffs further acknowledge the controlling Oklahoma law in ¶ 10 of the Complaint stating as follows: "The Housing Authority of the Absentee Shawnee Tribe (hereinafter "ASHA") was created pursuant to the Oklahoma Housing Act (63 O.S. § 1057) and is also located in the Western District . . . " See Petitioners' App. 43, ¶ 10.

[6] "In deciding whether the matter in controversy involves [a federal question], only the complaint should be examined, and indeed, only those parts of the complaint directly and necessarily relating to the plaintiff's cause of action should be considered." *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479 (10th Cir. 1975). See also *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936) and *Taylor v. Anderson*, 234 U.S. 74 (1914). Petitioners' repeated attempts to belatedly explain what was meant by the deficient allegations in the Complaint are insufficient to invoke federal question jurisdiction. It is the face of the complaint that must be examined by the Court and that must adhere to the "well-pleaded complaint" rule.

[7] A conclusory statement such as that contained in the "Corrections to Complaint" document announcing jurisdiction is insufficient to invoke the jurisdiction of the federal court. See *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061 (N.D. W. Va. 1973) (rule governing pleading of jurisdiction in federal court requires more than simply alleging that jurisdiction exists, or citing federal statute; complaint should set out clearly facts necessary to support jurisdiction). See also, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-12 (1983)

When queried by the Tenth Circuit Panel at oral argument concerning the basis for federal question jurisdiction, counsel for the Three Tribes stated the basis as 24 C.F.R. § 1000.302[8] – a regulation promulgated by HUD and effective on *March 12, 1998* – almost a full year *after* the filing of the Three Tribes' complaint. Even though the Three Tribes could have amended the deficient complaint, even on appeal, 28 U.S.C. § 1653, no amendment was ever sought by the Three Tribes, and as the Tenth Circuit correctly noted, "[e]ven after a motion to dismiss had been filed in district court, specifically alleging that plaintiffs failed to plead the existence of a federal question, plaintiffs relied upon vague general statements about federal funding by HUD . . . It was not until after the district court dismissed their complaint that plaintiffs finally decided what they needed to argue to avoid such dismissal . . . ". Petitioner's App. 10 and 11.

Interestingly, the Three Tribes now contend that they are not required to state a specific statute in order to avoid dismissal for lack of federal question jurisdiction because they claim, for the first time, that their cause of action arises under federal common law. For this inconsistent and untenable position the Three Tribes cite *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). A careful reading of *National Farmers* does

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(under the "well-pleaded complaint rule, federal jurisdiction exists only when the plaintiff's complaint raises issue of federal law).

[8] Belated citation to this regulation was first noted in Appellants' Tenth Circuit Brief at footnote 31. See Petitioners' App. at 10.

not indicate that the Court eliminated the requirement of stating the basis of federal question jurisdiction. In fact, the Court emphasized the need of articulating such a claim.

> Thus, in order to invoke a federal district court's jurisdiction under 1331, it was not essential that the petitioners base their claim on a federal statute or a provision of the Constitution. *It was, however, necessary to assert a claim "arising under" federal law.*

National Farmers at 850. The Three Tribes have not contended, until now, that the basis of jurisdiction for their claim was federal common law and neither is such an acceptable position. Notwithstanding that the Three Tribes have belatedly asserted a supposed statutory basis for their claim, federal common law has traditionally arisen in the limited context of aboriginal property rights[9] and is not applicable where, such as here, the plaintiffs' claim to relief is dependent upon statute.

The ASHA was created by and continues to operate under state law pursuant to the Oklahoma Housing Authorities Act, 63 O.S. §§ 1051 et seq. The Plaintiffs attempt to confuse the matter by asserting that the ASHA, a state created entity, should be characterized the same as the Absentee Shawnee Tribe of Oklahoma, a federally recognized Indian tribe. To support this bizarre

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[9] "[In *Oneida I*], [w]e noted that the Indians' right of occupancy need not be based on treaty, statute, or other formal Government action. We stated that "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

posture, the Three Tribes rely on a prior decision of the District Court for the Western District of Oklahoma which was ultimately appealed to the Tenth Circuit Court of Appeals and this court, *Citizen Band Potawatomi Indian Tribe v. Collier*, 142 F.3d 1325 (10th Cir. 1998), *cert. denied sub nom. Absentee Shawnee Tribe v. Citizen Band of Potawatomi Indian Tribe*, 525 U.S. 947 (1998). The Three Tribes' reliance on *Collier*, supra, is misplaced. The issues ultimately decided in *Collier* surround the ability of the Secretary of the Interior to place land into trust for the benefit of the Absentee Shawnee Tribe without the consent of the Citizen Potawatomi Nation – an activity and issues totally unrelated to the activities of a state entity such as the ASHA. Under any circumstances, this case is totally irrelevant to the issues surrounding the instant matter.[10]

The Three Tribes contention, at its base, is that the ASHA is conducting operations outside of its "area of operation". Oklahoma law does not expressly state the boundaries for an Indian Housing Authority. However, it is clear that the resolution to the problem does not involve a federal question. See *Oklahoma Attorney General Opinion*, No. 78-136 ("An overview of 63 O.S. 1971, sec. 1061 and other related statutes shows that the Oklahoma Legislature failed to define with specificity what the 'area of operation' of an Indian Housing Authority was to include. Consequently, resolution of this issue must await

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[10] The Three Tribes' admit that the *Collier* case involved a "dispute with the Absentee Shawnee [Tribe] over territorial jurisdiction", Petitioner's Brief at 11, note 15, and that this is a case involving a dispute with the Absentee Shawnee Housing Authority – a separate and distinct entity. See Appellants' Tenth Circuit Brief at 16.

for legislative definition through its capacity to promulgate laws and amendments or be resolved on a case by case basis by a court of law.") As clearly stated by the foregoing opinion, the question of the "area of operation" of the ASHA is one of state law and therefore not cognizable in a federal forum.

It is indisputable that the ASHA receives funding from the Department of Housing and Urban Development. However, contrary to the Three Tribes' position, the Three Tribes' claim does not depend upon the construction of the federal statute which authorizes this funding. It is based entirely on the "area of operation" as defined by Oklahoma law. The fact the ASHA enters into contracts with HUD does not implicate federal law. The Annual Contribution Contracts between the ASHA and HUD do not make the definition of "operating area" a federal question. *See, Ippolito-Lutz, Inc. v. Harris,* 473 F. Supp. 255, 259 (S.D. N.Y. 1979) (when "federal law does not expressly create the remedy sought by plaintiff and because the determination of plaintiff's right to relief requires neither the construction and interpretation of the Act nor the application of federal principles in order to vindicate a distinctive policy of the Act" the controversy does not arise under federal law). Further, as the Tenth Circuit correctly pointed out, " . . . the fact that federal funds are involved is, by itself, insufficient to establish the existence of a federal question. *See, Eastern Shoshone Tribe v. Northern Arapaho Tribe,* 926 F. Supp. 1024, 1031 (D. Wyo. 1996); *see also United States ex rel. Gen. Rock & Sand Corp. v. Chuska Dev. Corp.,* 55 F.3d 1491 (10th Cir. 1995)." Petitioner's App. at 10-11. The relief sought by the Appellants would require the federal court to interpret and

define state statutory law, an area which is clearly outside the realm of authority of the federal court.

In the Three Tribes' Opening Brief before the Tenth Circuit, the Three Tribes admit that the "ASHA is a state agency established pursuant to Oklahoma law and is a legal entity separate and apart from the tribe", Appellants' Tenth Circuit Brief at 16, yet incredibly now before this honorable court, the Three Tribes make a blatant attempt to mislead the court by misstating information concerning "service areas"[11] and citing BIA regulations – not HUD regulations – to support the untenable argument that the ASHA's jurisdictional boundaries are coextensive with the jurisdictional authority of the Absentee Shawnee Tribe.[12]

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[11] The Three Tribes incorrectly cite 24 C.F.R. § 1000.302(vi) as the definition of a service area. Section 1000.302(vi) provides the definition of *formula* area – a geographical area that HUD uses to determine funding. Contrary to the Three Tribes' assertion, this regulation does not address or attempt to define "service area" of a state created Indian housing authority.

[12] The Three Tribes incorrectly state, without cited authority, "*Under HUD regulations*, the area of operation in Oklahoma for federal Indian housing programs is a tribe's trust lands and former reservation area. (Emphasis added.) Incredibly, the Three Tribes cite Department of Interior promulgated regulations regarding a Bureau of Indian Affairs program – not Department of Housing and Urban Development regulations which are applicable to this housing program of HUD. 25 C.F.R. § 256.2 is a regulation promulgated by the Department of Interior, Bureau of Indian Affairs ("BIA") with regard to the Housing Improvement Program. This is a program funded by the BIA and administered by the Absentee Shawnee Tribe. This program clearly has no connection to the ASHA. It would appear that the Three Tribes wish to misrepresent the law

Perhaps the most glaring and obvious error cited by the Three Tribes is 63 O.S. § 1054(f) for the definition of " 'area of operation' for an Indian housing authority created under state law." Petition for Writ of Certiorari at 4, fn. 6. Contrary to the Three Tribes' statement, noticeably *absent* from the definitions provided in 63 O.S. § 1054 is any mention of Indian housing authorities. 63 O.S. § 1054(f) defines "area of operation" as follows:

> (f) "Area of Operation" means:
>
> > (1) in the case of an authority of a city, the city and the area within one (1) mile of the territorial boundaries thereof, except that the area of operation of an authority of any city shall not include any area which lies within the territorial boundaries of some other city;
> >
> > (2) in the case of an authority of a county, all of the county for which it is created: Provided, that a county authority shall not undertake any project within the boundaries of any city unless a resolution shall have been adopted by the governing body of the city and by any authority which shall have been theretofore established and authorized to exercise its powers in the city declaring that there is need for the county authority to exercise its powers within that city. No authority shall operate in any area in which an authority already established is operating without the consent by resolution of the authority already operating therein.

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and misstate the facts in order to support their attempt to create federal jurisdiction where none exists.

Further, the Three Tribes misstate the impact of the formula area defined in the regulations for the Native American Housing Assistance and Self-Determination Act (hereafter "NAHASDA"), 24 C.F.R. § 1000.302. NAHASDA allows for flexible formula areas with consideration being given to the Census determinations and HUD's own consideration of previous and planned investment in the given area. *Id.* The consent requirement discussed by the Three Tribes in the Petition for Writ of Certiorari at page 5, fn. 7, and cited to the 1978 Oklahoma Attorney General's opinion, refers to state created Indian housing authorities. None of the Three Tribes have housing authorities that are state created; therefore this discussion is totally inapplicable to this controversy.

Moreover, the Three Tribes mistakenly rely on *Califano v. Sanders*, 430 U.S. 99 (1977) and *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967) for the proposition that "federal courts have jurisdiction to review agency action." Petition for Writ of Certiorari at 19, fn. 24 and at 16. The issue in *Califano* was whether § 10 of the Administrative Procedures Act ("APA") afforded a basis for federal judicial review of agency actions and if not, whether the Social Security Act provided this basis. The Court concluded that neither § 10 of the APA nor the cited section of the Social Security Act provided a basis for federal judicial review in this case. The holding in *Califano* does not dispense with the necessity of a well-pleaded complaint, exhaustion of administrative remedies, the need to demonstrate an independent federal question, or the necessity of a waiver of the United States' sovereign immunity.

Abbott, supra, questions whether, under the Administrative Procedure Act, 5 U.S.C. §§ 701-704, Congress intended to forbid pre-enforcement review of regulations promulgated by the Commissioner of Food and Drugs pursuant to the Federal Food, Drug, and Cosmetic Act. As the Tenth Circuit noted, the Three Tribes' complaint never mentioned or eluded to the Administrative Procedure Act and in fact, when questioned directly at oral argument as to whether he could have brought the action under the Administrative Procedure Act, counsel for the Three Tribes specifically stated that "he did not believe he could." Petitioners' App. at 9. Therefore, it appears "problematic" that the Three Tribes now assert errors were made by the Court and cite the Administrative Procedure Act as authority. The Three Tribes totally fail to invoke federal jurisdiction pursuant to 28 U.S.C. § 1331 for their claim.

The Three Tribes also rely on 28 U.S.C. § 1362 as a basis for this court's jurisdiction. 28 U.S.C. § 1362 specifically grants district courts jurisdiction in federal question cases brought by Indian tribes.[13] Section 1362 states as follows:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian

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[13] Of the six (6) plaintiffs in this matter, only three (3) are federally recognized Indian tribes. The other three (3) plaintiffs are tribal housing authorities and these plaintiffs would be unable to invoke jurisdiction under § 1362 as they are not defined as Indian tribes for these purposes. *See, Navajo Tribal Utility Authority v. Arizona Dept. of Revenue*, 608 F.2d 1228 (9th Cir. 1979).

> tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

In order for jurisdiction to attach under § 1362, the matter in controversy must arise under the Constitution, laws, or treaties of the United States, identical to the prerequisites under § 1331. *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479 (10th Cir. 1975). The purpose of § 1362 was to remove certain jurisdictional impediments for Indian tribes. See *Western Shoshone Business Council For and on Behalf of Western Shoshone Tribe of Duck Valley Reservation v. Babbitt*, 1 F.3d 1052, 1058 (10th Cir. 1995). Section 1362 did not, however, eliminate the federal question requirement and underpinning for a federal cause of action. *Id.* See *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 482 (10th Cir. 1975) ("In our view sec. 1362 does not dispense with the requirement of pleading a federal question."); *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714-15 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) (Congress used "arising under" language in section 1362 that is identical to that contained in section 1331.); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (declining to find § 1362 broader than § 1331). The Three Tribes have failed to invoke federal jurisdiction under § 1331 and thereby fail under § 1362 as well. The Tenth Circuit Court of Appeals correctly affirmed the District Court's dismissal of this matter; therefore, no compelling reason exists to grant the writ of certiorari. The writ must be denied.

II. THE WRIT MUST BE DENIED BECAUSE THE THREE TRIBES HAVE FAILED TO ESTABLISH LACK OF IMPARTIALITY REQUIRING DISQUALIFICATION OF THE PRESIDING JUDGE

The Three Tribes' Motion for Disqualification was based on the alleged personal bias and prejudice of the Judge and brought pursuant to 28 U.S.C. § 455(a). That section provides as follows:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

In applying this section, the objective test announced by the Tenth Circuit is "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993) and *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997). The initial inquiry is "whether a reasonable *factual* basis exists for calling the judge's impartiality into question." *Cooley* at 993. "The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom." *Id.* "A judge should not recuse h[er]self on unsupported, irrational, or highly tenuous speculation." *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). Courts have identified several factors which will not ordinarily satisfy the requirements for disqualification under § 455(a). These factors include:

> (1) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters;
>
> * * *

(3) prior rulings in the proceeding, or another proceeding, solely because they were adverse;

(4) mere familiarity with the defendant(s), or the type of charge, or kind of defense presented; . . .

Cooley at 993-94 (citations omitted).

The Three Tribes' Motion for Disqualification offered baseless innuendo and empty allegations of prejudice in support of its effort to disqualify the presiding judge. The Three Tribes complained that because the presiding judge previously served as the U.S. Attorney during the litigation of *Citizen Band Potawatomi v. Collier*, Case No. CIV-92-2161-R (W.D. Okla. Oct. 30, 1992), her impartiality must be called into question. The Three Tribes allege that the U.S. Attorney argued a position "virtually identical to that taken here by her successor, to wit: defending the expansive jurisdictional claims of the Absentee Shawnee." For the Three Tribes, this argument hinges on whether the *Collier* case and this case involve "essentially the same parties and issues which created an 'appearance of partiality' mandating disclosure and probably recusal." Petition for Writ of Certiorari at 21. The Three Tribes strain to analogize the issues herein with those involved in *Collier* in order to question the presiding judge's motives.

As a matter of record, the instant case and the *Collier* case are totally unrelated except for the fact that the Citizen Potawatomi Nation is a common Plaintiff in both matters and counsel for the Citizen Potawatomi Nation has appeared in both matters. The issues in the two cases involve different defendants and are totally dissimilar.

Collier questioned whether the Citizen Potawatomi Nation and the Absentee Shawnee Tribe share a common reservation area and whether 25 C.F.R. § 151.8 contains a requirement that the Secretary of the Interior obtain the consent of the Citizen Potawatomi Nation before placing land into trust on behalf of the Absentee Shawnee Tribe. The issues in the instant matter surround the area of operation of a state-created entity, i.e. the Absentee Shawnee Housing Authority, and whether Indian tribes and tribally created housing authorities can dictate the activities of a state-created entity. The Three Tribes' disingenuous extrapolation of the issues could not and does not in fact create any prejudice or bias on the part of the presiding judge.

Perhaps the most obvious difference between *Collier* and this case is the fact that the federal defendants in *Collier* did not appeal the final District Court's decision to the Tenth Circuit as the U.S. Attorney has done in this matter. These contradictory actions could hardly be seen as "a position virtually identical to that taken here by her successor" or as federal defense of the ASHA or the Absentee Shawnee Tribe in general.

The mere fact that the presiding judge held the position of U.S. Attorney prior to taking the bench is not in itself sufficient to require disqualification as the Three Tribes assert. The Three Tribes do not assert that the presiding judge "participated as counsel" in the *Collier* litigation, but rather that the judge had a "facially adverse interest" that prevented her from being impartial. This characterization of the judge as an individual who would use the powers of the federal court to effect

revenge on any party who has been successful in litigation against the United States is pure speculation and opinion and is not supported by any factual basis. Baseless allegations are insufficient to require disqualification of the presiding judge. *See United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993); *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997); *Willner v. University of Kansas*, 848 F.2d 1023, 1027 (10th Cir. 1988).

A. PLAINTIFFS' MOTION FOR DISQUALIFICATION WAS UNTIMELY AND CORRECTLY DENIED

"The party seeking recusal under § 455 . . . must do so in a timely fashion." *United States v. Kimball*, 73 F.3d 269, 273 (10th Cir. 1995) and *Willner v. University of Kansas*, 848 F.2d 1023 (10th Cir. 1988). The Three Tribes filed their Complaint in the instant matter on May 13, 1997. The case was immediately assigned to the presiding judge.

The Three Tribes' counsel of record in this matter was counsel of record for the Citizen Potawatomi Nation in the *Collier* case. Therefore, counsel was aware from the date of filing this complaint that the presiding judge had previously been the United States Attorney and that she had held such office during the litigation of the *Collier* case. This fact was not "uncovered" by any review of her background needlessly conducted by counsel. See Petition for Writ of Certiorari at 20.

The Three Tribes were aware of the presiding judge's previous association with the U.S. Attorney's office at the time the Complaint was filed. Yet the Three Tribes made

no motion for disqualification until such time as the Judge had ruled against their inadequate request for a Preliminary Injunction – more than three months after the filing of the Complaint. Adverse rulings cannot form the appropriate basis for disqualification. *Green v. Dorrell*, 969 F.2d 915, 919 (10th Cir. 1992).

Further, though the Three Tribes' now attempt some contrived explanation of their delayed actions, the Three Tribes' Motion was devoid of any explanation for the extended delay in seeking disqualification. In *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997), an unexplained one month delay was held to be untimely and thereby insufficient for disqualification. "Granting a motion to recuse many months after an action has been filed wastes judicial resources and encourages manipulation of the judicial process." *Willner* at 1029. Plaintiffs' unexplained delay in requesting disqualification and in obvious response to an adverse ruling is not sufficient to mandate disqualification of the presiding judge in this matter.

CONCLUSION

On May 13, 1997, the Three Tribes' filed a defective and insufficient complaint. Since that time, instead of attempting to amend the complaint in an effort to properly cure the defects, if possible, the Three Tribes' have urged the court to overlook those deficiencies and proposed to explain away, by whatever means available, the glaring inadequacies of the document. When the District Judge refused to look the other way but instead ruled

against the Three Tribes' requested relief, the Three Tribes' decided that the judge must recuse herself. The Three Tribes are unable to present any credible evidence in support of their belated Motion for Disqualification. Ergo, no compelling reason has been presented for this court to grant the Writ of Certiorari and such request must be denied.

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No. 99-1486

In the Supreme Court of the United States

SAC & FOX NATION OF OKLAHOMA, ET AL.,
PETITIONERS

v.

ANDREW CUOMO, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that petitioners had failed to establish an adequate jurisdictional basis for their suit.

2. Whether the district judge was required by law to recuse herself from participation in the case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 193 F.3d 1162. The opinion of the district court (Pet. App. 21-36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1999. A petition for rehearing was denied on December 9, 1999 (Pet. App. 40). The petition for a writ of certiorari was filed on March 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a dispute between three Indian Tribes in Oklahoma (petitioners in this Court)[1] and respondent Absentee Shawnee Housing Authority (ASHA) of the Absentee Shawnee Tribe (AST). Pet. App. 2-3 & n.1. The ASHA is a state entity established under the Oklahoma Housing Authorities Act, Okla. Stat. Ann. tit. 63, §§ 1051 *et seq.* (West 1997 & Supp. 1999). Pet. App. 4. The United States Department of Housing and Urban Development (HUD) supports the activities of ASHA and other tribal housing authorities under the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. 4101 *et seq.* (Supp. IV 1998).

Petitioners filed suit in federal district court, naming as defendants three HUD officers (respondents in this Court) and respondent ASHA. See Pet. App. 41-47 (Complaint). The gravamen of their suit was that respondent ASHA had illegally encroached upon their lands by purchasing houses located within the petitioners' reservation boundaries, and that HUD had acted unlawfully by permitting the encroachment to occur and by allocating federal funds to respondent ASHA for those activities. *Id.* at 45. The allegations of the complaint focused primarily on the circumstances of respondent ASHA's purported encroachment. *Id.* at 43-45. With respect to the federal defendants, the complaint alleged that the relevant HUD officials "have been continually advised of the ASHA's illegal encroachments on other tribes' areas, but have refused to

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[1] The petitioner Tribes are the Sac and Fox Nation Indian Tribe of Oklahoma, the Kickapoo Tribe of Oklahoma, and the Citizen Potowatomi Nation. Pet. App. 3 n.1.

halt the encroachments, and if not enjoined, will continue to allow these encroachments and allocate federal funding to the ASHA based thereon." *Id.* at 45. Petitioners alleged that "[j]urisdiction is based upon 28 U.S.C. 1331 and 28 U.S.C. 1362." *Id.* at 64. *Inter alia*, petitioners sought temporary and permanent injunctive relief precluding HUD "from allocating funding and allowing the operation of the ASHA outside of ASHA's legal area of operation," as well as an order directing HUD "to transfer all HUD projects in [petitioners'] operational/jurisdictional area to [petitioners]." *Id.* at 46.

2. The district court granted respondent ASHA's motion to dismiss the suit. Pet. App. 21-36. The court explained that

> [a] careful review of the complaint in this case reveals that [petitioners] do not plead any constitutional provision, federal law or treaty upon which federal question jurisdiction could rest. To the contrary, the only law at issue appears to be the Oklahoma Housing Authorities Act, [Okla. Stat. Ann. tit. 63, §§] 1051 *et seq.*, since the gist of [petitioners'] complaint is that ASHA is allegedly developing low income homes outside its "area of operation" as set out in the Oklahoma Housing Authorities Act.

Id. at 32. Because petitioners' "complaint fail[ed] to contain well-pleaded allegations that federal law creates [petitioners'] cause of action or that [petitioners'] right to relief depends on resolution of a substantial question of federal law," the court held that "the complaint must be dismissed for lack of federal question jurisdiction." *Id.* at 34. The court also stated that "[a]lthough [petitioners] attempt to put the focus

on the propriety, or not, of HUD's funding of ASHA, the propriety of such funding appears, from the complaint, to depend on a resolution of what is ASHA's proper area of operation under the Oklahoma Housing Authorities Act." *Id.* at 35-36.[2]

3. The court of appeals affirmed. Pet. App. 1-14. The court "first affirm[ed] the dismissal of the claims against ASHA." *Id.* at 8. It explained that

> those claims clearly present no federal question. [Petitioners] suggest no cause of action against ASHA that arises under or depends on the construction of any federal law. [Petitioners'] brief on appeal virtually concedes that only their claims against the federal defendants could conceivably pose a federal question.

Ibid.

The court of appeals "also h[e]ld that [petitioners'] complaint fails to articulate a substantial federal question with respect to those federal defendants." Pet. App. 8. The court explained that in the complaint itself, and in petitioners' subsequent brief in opposition to respondent ASHA's motion to dismiss, petitioners had "directed the district court to no specific federal law or regulation which they claimed was violated or which conferred federal question jurisdiction, nor did they articulate even in general terms how HUD could be liable for the claimed illegal activities of ASHA." *Id.* at 9. The court noted that petitioners had expressly disavowed reliance on the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Pet. App. 9 n.4.

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[2] In the alternative, the court held that the complaint should be dismissed for failure to join the AST as an indispensable party. Pet. App. 36.

The court of appeals acknowledged that in a footnote in their appellate brief, petitioners had identified the HUD regulation (24 C.F.R. 1000.302) purportedly violated by the agency's provision of funding to respondent ASHA. Pet. App. 10. The court "decline[d] to construe [petitioners'] appellate brief as an amendment of their complaint," *id.* at 11, however, explaining that "it would unfairly burden the district court to expect that court to independently identify the correct federal jurisdictional basis or risk reversal on appeal," *id.* at 12. Because petitioners in their district court filings had not affirmatively demonstrated the existence of federal jurisdiction, the court of appeals affirmed the district court's dismissal of the complaint. *Ibid.*

The court of appeals also rejected petitioners' contention that the district judge had acted unlawfully in declining to recuse herself from the case. Pet. App. 13-14. The court stated that recusal was not required by the fact that the judge had served as United States Attorney for the Western District of Oklahoma at a time when that office participated in a case similar to this one. The court explained that recusal was not required on that basis because petitioners had "expressly disavow[ed] any knowledge that the district judge personally participated in any way in the particular prior case." *Id.* at 14. The court of appeals also held that "[n]othing in the district court's rulings in this case provides a reasonable basis from which to infer partiality." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Under 28 U.S.C. 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." For purposes of Section 1331, a case "aris[es] under" federal law only when "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983).[3] "[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 112 (1936). As the courts below correctly held, petitioners failed to establish either that federal law creates a cause of action or that their entitlement to relief depends on the resolution of any federal question.

With respect to their claims against the federal defendants, petitioners' complaint alleged only that the relevant HUD officials "have been continually advised of the ASHA's illegal encroachments on other tribes' areas, but have refused to halt the encroachments, and if not enjoined, will continue to allow these encroachments and allocate federal funding to the ASHA based thereon." Pet. App. 45. Petitioners' brief in opposition to respondent ASHA's motion to dismiss vaguely stated that "[a]llocation of federal funding by the Federal Defendants is certainly a federal question. What

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[3] Petitioners also invoked 28 U.S.C. 1362, which authorizes the district courts to adjudicate certain civil actions brought by Indian Tribes. See Pet. App. 64. Section 1362, like Section 1331, is limited to cases "wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

are the former reservation boundaries of an Indian tribe is certainly a question arising under treaties between the United States and other Indian tribes. The proper administration of a federal program is obviously a controversy arising under federal law." Plaintiffs' Brief in Opposition to the ASHA Motion to Dismiss at 5 (filed June 23, 1997). Those assertions are patently insufficient to satisfy the well-pleaded complaint rule. Petitioners did not identify any provision of law that required HUD to halt the ASHA's purported "encroachments" or prohibited HUD from dispensing federal funds to support the ASHA's activities.

Petitioners have failed, moreover, to identify any waiver of sovereign immunity that authorized their suit against the federal defendants to go forward. "Sovereign immunity is jurisdictional in nature." *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994); accord, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). In the court of appeals, petitioners expressly disclaimed reliance on the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* —perhaps the most frequently invoked waiver of the federal government's sovereign immunity. See Pet. App. 9 n.4.[4]

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4 That concession appears well-advised. Although the complaint alleged in general terms that HUD has "refused to halt" respondent ASHA's purportedly illegal encroachments (Pet. App. 45), and that the agency "will continue to allow these encroachments and allocate federal funding to the ASHA" (*ibid.*), petitioners did not identify any "final agency action" (5 U.S.C. 704) that could serve as the focus of judicial review. Compare *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("Under the terms of the APA, [a plaintiff] must direct its attack against some particular

b. Petitioners observe (Pet. 15) that federal question jurisdiction may sometimes be premised on an alleged violation of federal common law. Petitioners cite no judicial decision, however, suggesting that the action of an Executive Branch agency could be set aside based on a purported violation of common law rules. Nor would reliance on federal common law obviate the need for petitioners to identify an applicable waiver of sovereign immunity. In any event, petitioners' complaint did not allege, even in the most general terms, any violation of federal common law.

The fact that this case involves the affairs of Indian Tribes (Pet. 15) also does not obviate the need for petitioners to establish that their claims arise under federal law and that the federal government has waived its immunity from suit. That is particularly so in light of the fact that respondent ASHA "is technically an agency of the State of Oklahoma." Pet. App. 4. Indeed, petitioners' complaint recognized that Oklahoma law "determines the operational/jurisdictional area of an Indian housing authority created under Oklahoma law." *Id.* at 44.

Petitioners also suggest (Pet. 15-16) that their suit falls within the jurisdiction of the federal courts because "[t]he relief sought was against a federal agency concerning its allocations of federally-appropriated monies to Indian tribes." But a federal agency, in dispensing federal funds, is under no general obligation to verify the recipient's compliance with all aspects of state law. In order to establish the existence of federal question jurisdiction, petitioners were required to identify a provision of federal law that prohibited

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'agency action' that causes it harm," rather than "seek[ing] wholesale improvement of [a government] program by court decree.").

HUD from funding projects undertaken outside a tribal housing authority's area of operation under state law. Petitioners' district court filings identified no such provision. See Pet. App. 9 (petitioners "directed the district court to no specific federal law or regulation which they claimed was violated or which conferred federal question jurisdiction, nor did they articulate even in general terms how HUD could be liable for the claimed illegal activities of ASHA"). And, as we explain above, petitioners failed to identify any waiver of sovereign immunity that would authorize a suit to enforce any funding prohibition that may have existed.

Finally, petitioners contend (Pet. 17) that "the Tenth Circuit's refusal to allow the alleged deficiency to be supplied on appeal acted contrary to decisions by this Court that complaints are to be liberally construed to do justice." The factbound question whether petitioners were given an adequate opportunity to remedy the deficiencies in their pleadings does not warrant this Court's review. In any event, the court of appeals can scarcely be said to have acted in a draconian fashion by declining to allow supplementation on appeal of a complaint that failed to identify either the provision of law that HUD was alleged to have violated or the waiver of sovereign immunity that would permit the suit to go forward. As the court of appeals recognized, "it would unfairly burden the district court to expect that court to independently identify the correct federal jurisdictional basis or risk reversal on appeal." Pet. App. 12.

2. Petitioners argue (Pet. 19-30) that District Judge Miles-LaGrange was obligated to recuse herself from this case because (1) she was the United States Attorney for the Western District of Oklahoma at a time when that office litigated a similar case, and (2) she con-

ducted the case improperly, giving the appearance of partiality. Those factbound contentions are erroneous.

a. A federal judge must recuse herself "in any proceeding in which [her] impartiality might reasonably be questioned." 28 U.S.C. 455(a). The standard is whether "it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). In the instant case, the federal government's district court filing in opposition to petitioners' disqualification motion stated that "[a]lthough Judge Miles-LaGrange was U.S. Attorney at the time of the litigation of the [prior] case, she was not the attorney who drafted the pleadings or appeared as the attorney of record in that action. Rather, several Assistant U.S. Attorneys, including the undersigned counsel, appeared in the action in defending the federal officials named as defendants." Federal Defendants' Special Appearance and Response in Opposition to Plaintiffs' Motion for Disqualification and Brief in Support Thereof at 4 (filed Sept. 16, 1997); see also *id.* at 5 ("to the best of undersigned counsel's memory at least from the time that he joined the U.S. Attorney's Office in August of 1994, Vicki Miles-LaGrange, while she was U.S. Attorney, did not actively participate in the [prior] case, draft any pleadings, or argue any motions concerning the action").[5] In the court of appeals, petitioners "expressly disavow[ed] any knowledge that the district court judge personally participated in any way in the particular prior case." Pet.

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[5] Thus, while the district judge "did not create a record or document her decision not to recuse," Pet. App. 13, the record does contain the representation of government counsel that Judge Miles-LaGrange was not actively involved in the prior litigation.

App. 14. And petitioners cite no authority suggesting that a federal judge who previously served as a United States Attorney must recuse herself from all cases raising legal issues similar to those litigated by her office during that prior period of service.

Petitioners' second asserted ground for recusal also lacks merit. The court of appeals correctly noted that "merely adverse rulings can almost never constitute grounds for disqualification." Pet. App. 14. Petitioners contend (Pet. 26-30) that their recusal motion is based on the timing rather than the content of the district court's rulings (and, to some extent, on the district court's failure to act in a timely fashion). As the court of appeals explained, however, petitioners "cite no authority for their claim that the time and manner of [the district court's] rulings creates a reasonable doubt about impartiality, absent any other indicia of bias or partiality." Pet. App. 14.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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SAC & FOX NATION OF OKLAHOMA, et al.,

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ANDREW CUOMO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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Respondents,[1] the Federal Defendants and ASHA, have filed briefs in opposition to the petition for writ of certiorari. The Petitioners[2] hereafter respond to new points raised in the opposition briefs.

ARGUMENT

The Three Tribes' petition seeks review of a circuit court decision affirming a district court order dismissing their complaint for lack of jurisdiction and an order denying a motion to recuse. The complaint sought prospective injunctive relief in the nature of mandamus against the Federal Defendants, an injunction against ASHA, and declarative relief. Recusal of the assigned judge was sought because of an appearance of partiality arising from involvement in prior related litigation and management of the case.

Federal Question Jurisdiction

ASHA and the Federal Defendants assert that federal question jurisdiction does not exist "merely because federal funds are involved" or because ASHA has entered contracts with HUD. ASHA Br. at 12. These arguments do not address the material issues raised (however inartfully) by the complaint. The Three Tribes alleged that the

---

[1] Andrew Cuomo as Secretary of the United States Department of Housing and Urban Development (hereafter "HUD"), Dom Nessi as Deputy Assistant Secretary for Native American Programs (hereafter "Nessi"), and Wayne Sims (hereafter "Sims") as Administrator of the Southern Plains Office of Native American Programs (hereafter "SPONAP") (hereafter collectively "Federal Defendants"); and the Absentee Shawnee Housing Authority (hereafter "ASHA").

[2] The Sac and Fox Nation of Oklahoma, the Housing Authority of the Sac and Fox Nation, the Citizen Potawatomi Nation, the Citizen Potawatomi Nation Housing Authority, the Kickapoo Tribe of Oklahoma, and the Housing Authority of the Kickapoo Tribe of Oklahoma, (hereafter the "Three Tribes").

Federal Defendants were violating federal law[3] and their ministerial duties and prayed for declarative and prospective injunctive relief. The issues raised by the allegations include:

> 1. Under federal law, can an Indian housing authority ("IHA") lawfully administer federal housing programs outside of the service area of its sponsoring tribe within the service areas of other tribes without their permission?
>
> 2. Does HUD have the authority under federal law to allocate federal funding to an IHA to administer federal programs in the service area of another tribe without its permission?
>
> 3. If HUD does not have authority under federal law to fund IHA operations that invade other tribes' service areas without permission, should a federal court prospectively enjoin HUD from continuing these violations of federal law?

Answers to these questions must come from interpreting federal statutes and federal regulations. Thus, "the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will. be defeated if they are given another." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). If the applicability of the federal statute upon which a plaintiff relies is genuinely at issue, "the federal courts possess jurisdiction and should reach the merits of the claim." *Id.* Where recovery is sought under the Constitution or the laws of the United States, a federal court must entertain the suit unless "the

---

[3] The Federal Defendants wrongly state that this "case arises out of a dispute between three Indian tribes * * * and" ASHA. Fed. Defs. Br. at 2. This case arose out of a dispute between the Three Tribes and the Federal Defendants. *See, e.g.*, Pet. App. at 45, ¶ 25.

alleged claim under the Constitution or federal statues clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-683 (1946).

ASHA dismisses the Three tribes' reference to 24 C.F.R. § 1000.302[4] as a valid federal question citation because it was adopted "almost a full year after the filing of the Three Tribes' complaint." ASHA Br. at 9. The NAHASDA regulation was cited in the Tenth Circuit Brief of Appellant because it was the law in effect when the brief was filed. A specific federal law cite was not earlier alleged for a number of reasons,[5] but most importantly because the District Court arbitrarily ended the jurisdiction discussion by entry of the July 7th stay order. The Three Tribes were precluded from fully exploring these issues before the district court. Had the Three Tribes cited prior HUD regulations, the Respondents would now be attacking the citations as law that is no longer in effect. Regardless of which regulation was cited, the same legal principle was applicable under the old and new law: In allocating federally-appropriated money, HUD has to determine where an Indian Housing Authority "is authorized to provide low-income housing." *Compare* definition of "Indian area" in the old regulation[6] and the new regulation.[7]

---

[4] This is a section of the regulation (Part 1000) adopted to implement the Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. 104-330, Oct. 1996, 110 Stat. 4016) (hereafter "NAHASDA"). 63 Fed. Reg. 12334 (Mar. 12, 1998).

[5] *E.g.*, when the Three Tribes filed suit, the old housing statutes and regulations would soon (within approximately five months) be superceded by NAHASDA.

[6] 24 C.F.R. § 950.102. Part 950 of title 24 of the Code of Federal Regulations is the regulation applicable to the "United States Housing Act of 1937, as added by the Indian Housing Act of 1988" and regulated how HUD "provides financial and

In making a determination of where an IHA "is authorized to provide low-income housing," SPONAP[8] may look to state law to decide where a state IHA is authorized to operate. However, even if SPONAP looks to state law in making a ministerial determination, the issue of the validity of that determination is still a "federal question." Whether SPONAP has properly allocated federal monies is always a federal question regardless of the laws relied upon by SPONAP in making the allocation decisions. Here, both federal and state law limited ASHA's service area to its sponsor's trust lands.

An IHA may operate only in "the geographic area over which an Indian tribe could exercise court jurisdiction or is providing substantial housing services and, where applicable, the Indian tribe or TDHE has agreed to provide housing services pursuant to a Memorandum of Agreement with the governing entity or entities (including Indian tribes) of the area[.] * * * " 24 C.F.R. § 1000.302 (emphasis added). Neither HUD nor ASHA has cited any law authorizing HUD to fund operations by a state IHA outside of its service[9] area nor produced any evidence that ASHA is only operating in its sponsoring tribe's service area or has entered a Memorandum of Agreement with any of the Three Tribes in whose services areas ASHA is operating.

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technical assistance to Indian Housing Authorities (IHAs) for the development and operation of lower income housing projects in Indian areas." *Id.* § 950.101, ¶ (a). Part 950 was "removed" when the NAHASDA final rule (Part 1000) was adopted. 63 Fed. Reg. 12334, 12349 (Mar. 12, 1998).

[7] *Id.* § 1000.10.

[8] HUD has "delegated authority to administer programs" under NAHASDA to SPONAP. 24 C.F.R. § 1000.10 (definition of "Office of ~~Native~~ American Programs").

[9] Indeed, HUD is violating the implicit restriction against funding two housing authorities for the same area. *See* 24 C.F.R. § 1000.326.

ASHA states that the Three Tribes "make a blatant attempt to mislead the court by misstating information concerning "service areas" and citing BIA regulations – not HUD regulations[.]" ASHA Br. at 13. However, ASHA does not refer to where the tribes made this alleged "blatant attempt to mislead the court." The Three Tribes have cited many different statutes and regulations. Whether a regulation is generated by HUD or by the BIA, HUD was required, prior to adoption of the NAHASDA final rule, to abide by the regulation when allocating federal housing monies to IHAs. *See* 24 C.F.R. § 950.200.

ASHA states that the Three Tribes have made "the untenable argument that the ASHA's jurisdictional boundaries are coextensive with the jurisdictional authority of the Absentee Shawnee Tribe" (ASHA Br. at 9) and that this is a "bizarre posture." *Id.* at 10-11.[10] This is not a "posture." It is the law. Artificial entities, such as ASHA, are controlled by the laws of their creation. ASHA was created at the request of its sponsor, the Absentee Shawnee Tribe of Oklahoma, whose governor appoints ASHA's board. 63 O.S. 1991, § 1057. ASHA's "area of operation" (service area) cannot be any larger than its sponsor's jurisdiction. *Id.* § 1054(f). *City of Ponca City v. Housing Authority of Kaw Tribe of Indians of Oklahoma*, 840 P.2d 653, 655 n.5 (Okla. 1992) ("it seems clear enough that * * * the phrase 'operating area of an Indian tribe, band or

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[10] ASHA's present attempt to distance itself from its sponsor conflicts with its earlier statements in this case. For example, the District Court dismissed this case, at ASHA's behest, on the alternative ground of "failure to join an indispensable party, the Absentee Shawnee Tribe of Oklahoma." ASHA Br. at 3. In unrelated litigation, the ASHA successfully argued before the Tenth Circuit that "ASHA is an enterprise designed to further the economic interests of the Absentee Shawnee tribe, and the tribe has exclusive control over the appointment and removal of its decision makers." *Duke v. Absentee Shawnee Housing Authority*, 199 F.3d 1123, 1125 (10th Cir. 1999).

nation' * * * [means] the boundaries of a contiguous terrestrial territory over which an Indian tribe has some degree of autonomous authority – commonly referred to as sovereignty – which existed at the time the housing authority was created.").

The Federal Defendants argue that the Three Tribes "have failed, moreover, to identify any waiver of sovereign immunity that authorized their suit against the federal defendants to go forward." Fed. Defs. Br. at 7. First, suit immunity can be waived if not asserted. Although the Federal Defendants raised sovereign immunity in response to the Three Tribes motion for a preliminary injunction, they never raised sovereign immunity in response to the complaint because they never responded to the complaint. Second, had the Three Tribes been given an opportunity to respond to the Federal Defendant's brief in opposition to a preliminary injunction[11] or to such an assertion in a response to the complaint, they would have cited authorities supporting the proposition that "Sovereign immunity has never been considered a bar to mandamus seeking 'to compel public officials to adhere to the duties imposed upon them in their official capacities.' *Knox Hill Tenant Council v. Washington*, * * * 448 F.2d 1045, 1052 n.8 (1971)." *Haneke v. Secretary of HEW*, 535 F.2d 1291, 1296 n.14 (D.C. Cir. 1976).

The Federal Defendants and ASHA emphasize that the Three Tribes told the Tenth Circuit that this action was not brought under the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.* ASHA Br. at 16; Fed. Defs. Br. at 7-8. SPONAP never advised the Three Tribes of the existence of any administrative remedies, but, instead, told them to seek resolution of the issues in "court."

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[11] The stay order entered 10 days after the filing of the Federal Defendants' brief precluded the filing of a reply brief which, in any event, was rendered moot by a denial of the motion on other grounds.

The resolution of this case will require the court to address HUD's oversight and funding of federal housing programs and interpretations of HUD regulations regarding Indian Housing Authorities. As such, "the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362. *See Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 480-82 (10th Cir. 1975) (Federal question jurisdiction exists if the claim is founded upon federal law).

Recusal of Assigned Judge

ASHA extends § 455(a) beyond its plain wording and intent by implying that the Three Tribes must establish actual bias on the part of the Assigned Judge. ASHA Br. at 18. ASHA states that "baseless allegations are insufficient to require disqualification of the presiding judge" citing *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997). ASHA Br. at 21. However, the standard to be applied under 28 U.S.C. § 455(a) is that "a movant must show that a reasonable person, knowing all of the circumstances, would harbor doubts about the judge's impartiality." *Id.* (citing *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993)). The promotion of "public confidence in the integrity of the judicial process" is an important policy. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988). The elimination of even the appearance of impropriety is desirable. *Id.*, 486 U.S. at 860.

The Three Tribes sought recusal only after entry[12] of a *sua sponte* stay order that precluded any further discussion of jurisdiction, any amendments to the complaint,[13]

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[12] The Complaint was filed May 13, 1997. The stay order was entered July 7.

[13] Any request to amend the complaint prior to the Federal Defendants' response to the complaint thereto would have been premature. The Three Tribes reasonably assumed (prior to entry of the stay order) that the jurisdiction issue would not be fully

any response to outstanding discovery, and any further discovery. The filing of this unusual order prompted the Three Tribes to conduct the investigation that lead to the realization that the assigned district judge had served as U.S. Attorney when that office was defending the interests of the Absentee Shawnee Tribe against one of the Three Tribes involving similar issues in prior litigation including the precise issue of whether the Absentee Shawnee were an indispensable party.[14]

Contrary to ASHA's assertion that the Three Tribes' motion was untimely,[15] the Three Tribes moved for recusal as soon as they realized the district judge was involved in the prior litigation. Because the recusal motion was filed as soon as the Three Tribes learned the facts giving rise to the asserted basis for recusal, the motion was timely filed. *See, e.g., United States v. Pearson*, 203 F.3d 1243, 1276 (10th Cir. 2000). Although ASHA tries to imply bad faith in the timing of the Three Tribes' motion, the facts giving rise to the recusal motion were also readily available to the assigned judge. "When a judge fails to remove himself *sua sponte* under § 455(a), a party may ask the judge to recuse himself pursuant to

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joined until the principal defendants responded to the complaint. As it turned out, the Federal Defendants never responded. Thus, ASHA's argument that the Three Tribes should have attempted to "amend the complaint" (ASHA Br. at 22) is not, under the circumstances, valid.

[14] ASHA argues that the "most obvious difference" between the prior litigation "and this case is that the federal defendants in" the prior litigation "did not appeal the final District Court's decision to the Tenth Circuit as the U. S. Attorney has done in this matter." ASHA Br. at 20. In the prior litigation, two appeals were made to the Tenth Circuit. The Assigned Judge was the U.S. Attorney during the first appeal. The decision not to participate in the second appeal was made by the Assigned Judge's successor. The U.S. Attorney did not appeal "the final District Court's decision" "in this matter."

[15] ASHA Br. at 21.

that section." *Id.* (citing *Liteky v. United States*, 510 U.S. 540, 542-543 (1994)).

ASHA grossly exaggerates the Three Tribes' position by implying that the Three Tribes have attempted to characterize the district judge as seeking "revenge on any party who has been successful in litigation against the United States." ASHA Br. at 20-21. Cutting through the childish hyperbole, all the Three Tribes have asserted is that, under the circumstances, the district judge's impartiality "might reasonably be questioned." Questions regarding the district judge's involvement and motivations might have been resolved had the judge simply followed the requirement of § 455(a) and documented the reasons for denying the recusal motion and explaining the involvement in the prior litigation.

The Federal Defendants concede, as they must, that "the district judge 'did not create a record or document her decision not to recuse.' " Fed. Def. Br. at 10, n.5. Nevertheless, they attempt to justify this failure to comply with the clear mandate of § 455(a) because "the record does contain the representation of government counsel that Judge Miles-LaGrange was not actively involved in the prior litigation" quoting "to the best of **undersigned counsel's memory** at least from the time that he joined the U.S. Attorney's office in August of 1994,[16] * * * [the Assigned Judge], did not actively participate in the [prior] case, draft any pleadings, or argue any motions concerning the action." *Id.* (emphasis added). This representation is not adequate because U. S. Attorneys rarely, if ever, actually draft pleadings or argue motions. However, they presumably are the decision-

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[16] The "undersigned counsel" did not appear as attorney of record in the prior litigation until September of 1995. The prior litigation was filed in 1993 and the first appeal was decided in 1994. The Assigned Judge was sworn in as a judge October 8, 1994. *See* Pet. at 21. The "undersigned counsel was hardly competent to make a representation concerning the Assigned Judge's participation in the prior litigation.

makers in cases arising during their tenure in office and, as such, clearly advocates. *See* Pet. at 22, n.27. Even if this justification were adequate and supported by legal authority, the district judge did not rely upon the "representation of government counsel" regarding her activities in the related litigation. Instead, the judge denied the recusal motion "for the reasons stated in defendant Absentee Shawnee Housing Authority's September 15, 1997 response brief." App. 20. In any event, a judge should not be allowed to circumvent the requirement for a judge to create the judge's record representation of the involvement in related litigation. Certainly the requirement cannot be avoided simply because one of the parties who is not in a position to know makes a vague representation of the judge's involvement that the judge does not thereafter adopt or affirm.

CONCLUSION

The petition for certiorari should be granted and the Tenth Circuit decision affirming dismissal of the complaint and entry of the order denying recusal should be reversed.

Respectfully submitted,

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